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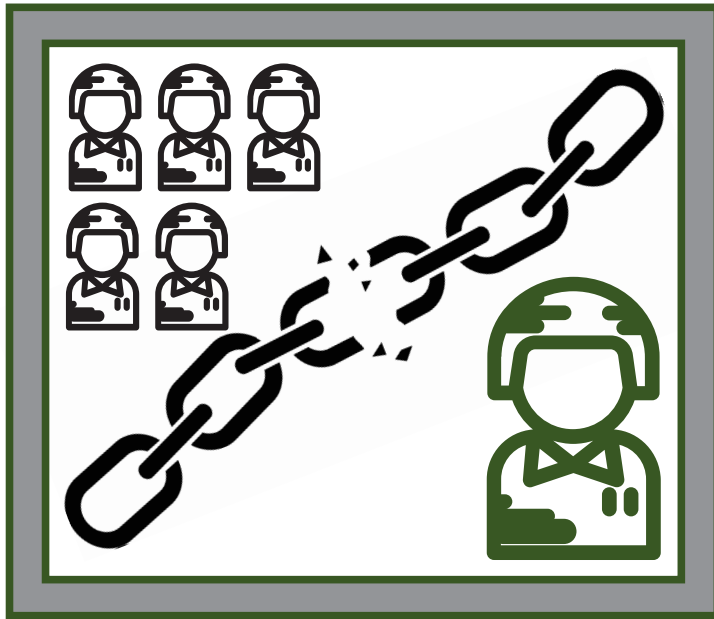
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# **BREAKING THE CHAIN OF COMMAND**



**Toward a theoretical framework:  
Explaining how and why soldiers  
disobey illegal orders**

Eva Whitehead



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VRIJE UNIVERSITEIT

**BREAKING THE CHAIN OF COMMAND**

Toward a theoretical framework: How and why soldiers refuse to obey illegal orders

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Eva Whitehead, The Hague, December 2020

# Preface

The publication of the Brereton Report in November 2020 reminds us that the subject and reality of war crimes are neither only a gruesome matter of the past nor reserved for armed personnel of authoritarian regimes. Military culture, in particular in special forces, operating under exceptional circumstances and under less supervision, can, unfortunately serve as fertile ground for immoral and illegal conduct.

Leadership takes a prominent role in a system of obedience, leaders are more responsible than subordinates. At the same time, I believe that the role an individual could and, I believe should, play, may too often be disregarded.

The origin of the present research is based on the study of perpetrators of war crimes, which naturally include “bad apples”. But, it also includes understanding how and why “good apples” can start to rot, for a variety of reasons. Yet, when studying how *easily* people transform into perpetrators, I became intrigued with finding out more about those (fewer) individuals who did not transform. What about the apples that did not rot, despite being in the crate with the rotten apples?

In order to promote lawful behaviour, we first need to understand factors that contribute to it (or constitute obstacles). Then, after we have dealt with theoretical underpinnings, practical aspects should be addressed, so the duty to disobey illegal orders (and possibly even report on illegal conduct) becomes part of military integrity and culture. Yet, this is not something external academics can achieve, change has to be desired and implemented from within.

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# INTRODUCTION

On the morning of the 16<sup>th</sup> of July, 1995, then 23-year-old soldier Dražen Erdemović, and seven other members of the 10th Sabotage Detachment of the Bosnian Serb Army were ordered to leave their base at Vlasenica to go to the Pilica farm north-west of Zvornik. Shortly after their arrival, the soldiers were informed by their superiors that buses from Srebrenica carrying Bosnian Muslim civilians between 17 and 60 years of age would be arriving throughout the day. Starting at around 10 o'clock in the morning, the Muslim men were escorted in groups of ten to a field nearby the farm buildings, where they were lined up with their back towards Erdemović and the other members of the firing squad. Commander Brano Gojkovic gave orders to execute the civilian men.<sup>1</sup> What should soldiers, bound to obey orders, do after receiving such an illegal order? What can they do? And what are they likely to do in actual practice?

This study is concerned with these very questions. More specifically, this study focuses on forms of conscientious<sup>2</sup> disobedience; soldiers who break the chain of command by refusing to carry out illegal orders. Numerous issues need to be addressed here, for example: are soldiers capable of distinguishing between illegal and lawful orders?<sup>3</sup> Do they have a duty to disobey all illegal orders, and, if so, how should they and why would they disobey?

Immanuel Kant wrote in 1784, “it would be very ruinous if an officer, to whom something is commanded by his superiors, on duty, wanted to quibble openly about the appropriateness or

---

<sup>1</sup> Trial Chamber, Prosecutor v Karadžić, Mladić, IT-95-R61, IT-95-5-R61, 5 July 1996, transcript of the Rule 61 hearing, p.843.

<sup>2</sup> The term “conscientious” in the military is usually associated with “objection” as referring to persons who refuse to carry a weapon, or selective conscientious objectors who only refuse to fight in a specific war. While the military usually rejects applications for selective conscientious objection, many Western militaries do accept general reservations about carrying arms.

<sup>3</sup> In most literature “unlawful” and “illegal” are used interchangeably. Chapter One, however, draws a crucial distinction between the two.

usefulness of this order; he must obey”.<sup>4</sup> His point is that a military officer should obey orders, even if they consider them to be inappropriate or useless. The situation, however, may be different in the case of soldiers who are confronted with *illegal* orders. When it comes to illegal orders, members of most militaries are exempted from their duty to obey their superiors’ orders. In such cases, soldiers cannot rely on the *defence of superior orders* and may be held criminally accountable for their actions, even if they were ordered to carry them out (Dinstein, 1965; Keijzer, 1978; Osiel, 1999; van Sliedregt, 2012).<sup>5</sup>

Given that most soldiers are not lawyers, the common approach to the question of due obedience reduces soldiers’ duty to disobey to that of disobeying *manifestly illegal* orders (Osiel, 1999, p. 46). Manifestly illegal orders can be understood as those orders, whose illegality is *immediately obvious to anyone* (Osiel, 1999, p. 5). Simply put, the rationale behind this rule is that if soldiers were to question the legality of all orders, then the efficiency of the organisation would be at risk, as the military expects immediate obedience from its subordinates (Bröckling, 1997, p. 9).<sup>6</sup>

Once a soldier has received an order that she or he has identified as being illegal, the question then becomes *how* they can go about disobeying the order. Ordinarily, disobedience constitutes an offence in the military, except when concerning illegal orders. Despite the legal exemption from the duty to obey, a soldier who wants to refuse to follow an illegal order invariably finds him or herself in a dilemma, a dilemma that this research aims to explore from a multidisciplinary angle.<sup>7</sup>

Disobeying illegal orders is not a routine occurrence and litigated cases are infrequent for a variety of reasons (Osiel, 1999, p. 1). First, a clearly illegal order must be issued. Second, a soldier must find a way to disobey. Third, the soldier’s conscientious disobedience of that illegal order has to be made public. If illegal orders are given, most modern military institutions would likely not make this known due to concern about the public out roar about the issuance of illegal orders in the first place. Some known cases of military staff who have disobeyed orders however do exist and they even include high ranking officers, such as the case of Wehrmacht field marshal Erwin Rommel. He is said to have first ignored and then burned Hitler’s order to execute prisoners of war, the “Kommando Befehl” (Lieb, 2013, pp. 314-316).

---

<sup>4</sup> “So würde es sehr verderblich sein, wenn ein Offizier, dem von seinen Oberen etwas anbefohlen wird, im Dienste über die Zweckmäßigkeit oder Nützlichkeit dieses Befehls laut vernünfteln wollte; er muß gehorchen. Es kann ihm aber billigermaßen nicht verwehrt werden, als Gelehrter, über die Fehler im Kriegesdienste Anmerkungen zu machen, und diese seinem Publikum zur Beurtheilung vorzulegen.” Extracted from: ‘Beantwortung der Frage: Was ist Aufklärung?’ published in *Berlinische Monatsschrift* in 1784.

<sup>5</sup> Throughout the study, the term *soldiers* is used to refer to all members of the armed forces, including officers, members of the Military Police and members of other specialized police forces. This investigation focuses on enlisted soldiers rather than officers.

<sup>6</sup> Chapter Three deals with military discipline in greater detail. Military discipline and obedience are necessary, for example, in controlling the use of lethal force.

<sup>7</sup> Interdisciplinary and multidisciplinary are used interchangeably.

Commanding officers carry superior or command responsibility, and most are educated in the laws of war as well as in ethical decision-making (Carrick, Connelly, & Robinson, 2009; Robinson, De Lee, & Carrick, 2008; Wertheimer, 2010). However, the dilemma is more complicated if the receiver of the illegal order is not an officer, but rather a low-ranking or *enlisted* member of the military. There are few studies examining soldiers at the bottom of the chain of command who refuse to follow illegal orders or refuse to commit *crimes of obedience*<sup>8</sup> for conscientious reasons. In the present research, conscientious disobedience is defined as “any form of *not* carrying out an order because it is perceived as illegal”.<sup>9</sup> The central question in this research is: *how and why do soldiers refuse to obey illegal orders?*

Concerning the disobeying of illegal orders, scholars of international law have hitherto extensively discussed individual criminal responsibility and the exclusion of the defence of superior orders in international law. For example, Dinstein (1965) criticised the fact that international tribunals have generally excluded the defence of superior orders. Keijzer (1978) conducted a comparative analysis of the limits of the duty to obey, while more recently an extensive case law review by van Sliedregt (2012) contributed to the body of knowledge on assessing individual criminal responsibility in international law.<sup>10</sup>

One of the most thorough legal and social investigations into military obedience is Osiel’s *Obeying Orders* (1999), in which he critically examines the shortcomings of the legal duty to disobey. Osiel places his main focus on the role of the officer. Although the legal limits of obedience are well-established, illegal orders that warrant a duty to disobey do not occur in a vacuum; rather, soldiers are impacted by their social and institutional environment (Kelman & Hamilton, 1989; Smeulders, 2011; Talbert & Wolfendale, 2019; Winslow, 1999a, 1999b; Zimbardo, 2008). Scarce attention has been paid to enlisted soldiers at the bottom of the chain of command who refuse to obey illegal orders.

Social psychologists such as Milgram and Asch have demonstrated that a majority of people in experimental settings tend to carry out wrongful demands from an authority, as well as adjusting their behaviour to what they believe the group expects of them, even if they themselves do not agree (Asch, 1956; Milgram, 1974). The present study takes recourse to this seminal work in order to understand why and how individuals tend to obey authority figures and conform to groups in the context of *international crimes* (Kelman, 1993; Waller,

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<sup>8</sup> Kelman and Hamilton define crimes of obedience as crimes which are sanctioned (or directly ordered) by the authority (Kelman, 1993). This concept applies to the present study, as the soldiers are being ordered to commit a crime which they would not otherwise have perpetrated. This context can overlap with that of international crimes, a context in which the authorities are involved in the crime (even though war crimes can also occur spontaneously and do not have to be ordered). The outstanding difference with ordinary crimes is that when the crime is orchestrated, instigated or ordered by the authority, more normal law-abiding and otherwise not criminally-minded people take part in committing the sanctioned crimes.

<sup>9</sup> Chapter One explores the terms used from a military perspective, where disobedience refers to the failure to comply with an order or regulation.

<sup>10</sup> More recent publications also focus on the defence of superior orders in modern combat, as “killing on command” (O’Sullivan, 2016), along with examining the difference between the defence of superior orders as per the Rome Statute versus customary international law (Gaeta, 1999).

2010; Welzer & Christ, 2005).<sup>11</sup> The theoretical foundations that have been laid by social psychologists and criminologists not only help explain people's tendency to obey immoral demands from an authority, but can also be applied to soldiers who are ordered to carry out an illegal act (Bandura, 1999; Baumeister, 1996; Blass, 2009; Elms, 2009; Milgram, 1964; Packer, 2008; Smeulders, 2008, 2011, 2019; Smeulders & Grünfeld, 2011; Twenge, 2009; Zimbardo, 1974).

The present research considers established factors which have previously been used to explain the behaviour of individuals carrying out immoral or illegal demands in a context in which the authority is involved in the orchestration of the illegal orders. Previous studies of international crimes have in particular focused on understanding how the environment contributed to the occurrence of crimes on a systematic scale, and on explaining how and why individuals became perpetrators. Those individuals who did *not* participate in an illegal act under the same circumstances have received less academic attention.<sup>12</sup> The present study draws attention to the behaviour of those soldiers who refused to take part in illegal acts despite environmental influences promoting obedience, and seeks to understand better the position of individuals who refuse to become perpetrators.

The subjects of the above referred to social psychology experiments were civilians in an artificial experimental setting, while soldiers are embedded in the military environment, have sworn to and are legally bound to obey orders, and are required to conform to their institution's expectations. Therefore, the way in which military institutions and the war context may impact upon individuals, as well as the general social forces demonstrated by social psychologists needs to be taken into account (Winslow, 1999b, 2000). The present study explores whether the same factors and social influences can be used, or inverted, to explain the *disobedience* and *nonconformity* of soldiers who broke the chain of command in order *not* to perpetrate crimes.<sup>13</sup>

## I Aims and scope of the study

Osiel pointed out that a detailed study of where and why soldiers did not comply with illegal orders did not hitherto exist (Osiel, 1999, p. 298).<sup>14</sup> The present research aims to begin to

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<sup>11</sup> *International crimes* will be defined further in Chapter One. Here, it should suffice to mention that international crimes, as defined by the Rome Statute and the International Criminal Court, include the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

<sup>12</sup> Some social psychological analyses were conducted though on individuals who did not want to carry out immoral demands (Schurz, 1985), while some social psychologists studied individuals (not soldiers) who did "the right" action (James, Freeman, & Zimbardo, 2008; Oliner, 2003; Oliner & Oliner, 1992).

<sup>13</sup> Some authors have previously already paid attention to this challenge. For example, published information on resistance in the East German military/police, including cases of enlisted guards' conscientious disobedience, which are taken into account and built upon in the present research (Diedrich, 2005; Wenzke, 1995, 1998, 2006).

<sup>14</sup> "A careful exploration of Walzer's taxonomy and useful additions to it would employ examples from military history to show where and why each form of non-compliance proves most effective in the face of unlawful or imprudent orders. Because such a study does not currently exist, we must approach the subject in a more *ad hoc* fashion." (Osiel, 1999, p. 298). Earlier, Walzer (1977) noted that "superior orders are not always enforced at the

close this gap in extant knowledge. By conducting a multidisciplinary exploration of conscientious disobedience of soldiers, the study sheds light on the dilemmas soldiers face: soldiers who (want to) refuse to obey illegal orders in the context of *international crimes*. Interest in soldiers' conscience and dissent is growing, as evidenced by recent publications (Caron, 2019; Ellner, 2014b; Linn, 1996, 2002; Takemura, 2006; Whetham & Carrick, 2009) and the fact that it constituted a key topic of the 2019 Conference of the European Society for Military Ethics on Voice and Dissent in the Military.<sup>15</sup>

Previous research has tended to either focus on (selective) conscientious objectors (Ellner, 2014b; Linn, 1996, 2002; Whetham & Carrick, 2009) or the role of commanding officers (Bradley, 2011; Cook, 2008; Tripodi, 2011a, 2011b). However, the present study of conscientious disobedience constitutes a novel approach to studying enlisted soldiers who refuse to obey, by taking into account the manifold factors that are likely to impact on the individual in the situation.

The present study, which lies at the intersection of legal, social psychological and anthropological scholarship, attempts to apply a newly proposed theoretical framework to the analysis of two empirical cases. It is based on an examination of the legal duty to disobey illegal orders, as well as the potential factors that may further influence the behaviour of soldiers, which is derived from findings from (social) psychology and anthropological studies of how the military institution functions as alluded to above. Part of the theoretical framework developed in this study is a taxonomy of disobedience, in which different forms of conscientious disobedience are described, conceptually distinguished from each other, and illustrated by historical examples. The taxonomy can clarify why not all forms of conscientious disobedience of illegal orders are equal. Finally, in order to be able to analyse not only *how* but also *why* subjects did not want to obey illegal orders, empirical data from two case studies is analysed in the context of the aforesaid theoretical framework.

In the theoretical chapters, the study *first* explores psychological and institutional factors for *why* soldiers obey or disobey and *then* describes *how* soldiers have and can disobey(ed). When using the theoretical framework in the analysis of the two case studies (Chapters Five and Six), the order of why and how is inverted: *first* it is discussed *how* soldiers disobey, *before* respective reasons for *why* they disobeyed are analysed.

The present study brings together research from international lawyers, criminologists, social psychologists and anthropologists. While this multidisciplinary approach integrates various aspects that impact upon soldiers' behaviour, the depth of the contribution of each discipline is more limited than it would be if the study was conducted from the point of view of a single

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point of a gun....there are ways of responding to an order short of obeying it: postponement, evasion, deliberate misunderstanding, loose construction, overly literal construction and so on" (Walzer, 1977, p. 314).

<sup>15</sup> See the topic of the 2019 Conference of the European Society for Military Ethics, Voice and Dissent in the Military and the 2018 update of the 2004 study on the "Roots of Behaviour in War", published by the International Committee of the Red Cross, which was updated and retitled to "Roots of Restraint in War".

discipline. While attempting to understand conscientious disobedience, the present study is not exhaustive; for example, a purely deontological approach is not included.<sup>16</sup> The empirical part of the present study is of a limited scope and of an explorative nature. The two empirical case studies pursued in Chapters Five and Six primarily aim to show how the theoretical framework as developed in the first part of this study can improve and enrich the analysis of empirical data in this specific field. In the future, in a fruitful dynamic between conceptual theory and empirical practice, the empirical analysis of concrete cases and examples may lead to modifications and improvements of the theoretical framework.

## II Outline and methodology

In this study a combination of approaches from multiple disciplines is required to understand the different aspects of this complex phenomenon. First, Chapter One takes a legal-theoretical approach and investigates how the law defines *illegal orders* and if, or in what instances, a duty to disobey exists. Second, Chapter Two presents theories from (mainly) social psychology to identify the factors that influence people's tendencies to obey and conform to immoral demands from an authority or to go along with a group despite one's own judgement. Given that the soldier is situated in a military context, the impact of the respective military institution the soldier belongs to, not to mention the potential involvement in a specific conflict, must be taken into account when investigating the soldier's behaviour, as suggested by Chapter Three. Subsequently, Chapter Four distinguishes between forms of conscientious disobedience and places the behaviour in a taxonomy to illustrate different ways how soldiers may refuse to obey illegal orders. Finally, the chapter concludes by presenting the proposed theoretical framework for the study of conscientious disobedience. The taxonomy that describes *how* soldiers can disobey, is then included in the theoretical framework, which suggests which factors to examine to understand and to explain reasons for *why* a soldier may has disobeyed. Next, the suggested theoretical framework is used for the analysis of the behaviour of soldiers in two case studies, how and why some soldiers refused to take part in the killings of civilians in My Lai, Vietnam, is discussed in Chapter Five, while Chapter Six explores how and why some former East German border guards refused to shoot civilians attempting to cross the border.

### ***Chapter One: The legal-theoretical approach to understanding illegal orders and the duty to disobey***

Chapter One examines and problematises the legal approach to soldiers' duty to disobey; and defines the concepts of *illegal orders* and *duty to disobey*. The research reviews published works on the topic, as well as domestic and international legal instruments, selected case law

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<sup>16</sup> There is some debate concerning what soldiers should do regarding selective conscientious objection and officers' conscientious dissent (Lucas, 2009; Montrose, 2014; Wolfendale, 2009). However, when it comes to conscientious disobedience of illegal orders, the assumption is that a soldier should refuse to obey illegal orders. The author has not found relevant articles on why he should refuse to obey. The duty to disobey is discussed in more detail in Chapter One.

and selected military publications. In order to answer the question *in what situations do soldiers bear a legal duty to disobey*, the chapter first considers approaches taken by scholars in international criminal law, which, by their nature, are designed to be universally applicable, and, as such, are expedient for providing a broad preliminary answer to the question of when, in theory, *all* soldiers bear the duty to disobey illegal orders (*i.e.*, cases in which they carry individual criminal liability).<sup>17</sup> However, soldiers may also have a duty to disobey illegal orders under domestic military law.

Relying on U.S. military documents, the chapter proceeds to differentiate between a broader category of orders that do not have to be obeyed and explores differences between wrongful, unlawful, illegal, and immoral orders.<sup>18</sup> Examining military documents offers definitions and terms, and provides insight into messages that may be transmitted to soldiers with regard to the illegal orders and their duty to disobey under domestic law.

To this end, the more *traditional* U.S. approach is contrasted with the German approach. The U.S. military constitutes one of the largest, most active military institutions on the planet and could be considered to represent a rather *traditional* institution, especially in terms of its civil-military separation. By contrast, the Bundeswehr, the German military, regards its soldiers to be *civilians in uniform*, and its approach to the duty of disobeying illegal orders is grounded in the experiences of Wehrmacht soldiers in World War II. The German military can be considered as *reluctant*: the Bundeswehr was designed as allied military, only deployed to support international missions, removed from the front line (Neugebauer, 2008). This remained the case until the Bundeswehr was involved in combat during the intervention in Kosovo in 1999 and, in turn, the Bundeswehr adopts a different legal approach to disobeying illegal orders.

After analysing the U.S. domestic context, the chapter returns to the international perspective and deals with (illegal) orders that could lead to the perpetration of the *most serious crimes*, for which an individual (soldier) can be held responsible, as established by the Rome Statute (Shaw, 2005, p. 237). Finally, the chapter examines what the international and domestic approaches entail for a rank-and-file soldier given an illegal order. The first chapter does not constitute an exhaustive review of case law apropos disobedience of illegal orders; rather,

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<sup>17</sup> One legal approach to illegal orders that should apply universally to all soldiers is the approach suggested by the International Criminal Law community, as defined in the Rome Statute that established the International Criminal Court. Accordingly, the chapter describes illegal orders that might qualify as leading to “international crimes”, before exploring how this approach to (international) illegal orders and the duty to disobey may be relevant for soldiers.

<sup>18</sup> While illegal orders are often also immoral orders, the study excludes conscientious disobedience of lawful, but immoral orders. Immoral orders, including their relevance, are discussed in Chapter One. The present study is thus not concerned with conscientious objection per se, as conscientious objectors are individuals who refuse to carry arms in general. Even though conscientious objection constitutes a closely related topic, the subjects or soldiers in the present study are not opposed to carrying arms, but are opposed to committing crimes. *Selective* conscientious objection is perhaps more closely related to the scope of this study, as in many of those cases, the soldiers in question believe that the specific war that they are expected to fight in is itself an illegal war, that is, a war that lacks a “just cause”. This concept too, will be addressed at length in Chapter One. Furthermore, conscientious objection can be seen as a way of labelling how soldiers respond to illegal orders, which is explained in the taxonomy in Chapter Four.



the chapter aims to explore what might be expected of the soldier in a situation when he is given an illegal order, both from the perspective of the institution and the international (legal) community.

### ***Chapter Two: (Social) psychological explanations for (dis)obedience and (non)conformity***

Chapter Two discusses the social psychological dimension of obedience and conformity, before proceeding to introduce the psychological mechanisms that are used to explain the obedience and conformity of individuals asked to carry out immoral demands by an authoritative figure. This body of research on obedience and conformity is relied upon to explore how social psychological *moderators*, that is, those factors that impact the behaviour of people, may also impact the rate of *disobedience* or *nonconformity*. After first defining the terms and concepts used, the chapter then discusses seminal experiments that help to explain the behaviour of perpetrators of international crimes (Haney & Zimbardo, 2009; Osofsky, Bandura, & Zimbardo, 2005; Smeulders, 2011; Smeulders & Grünfeld, 2011).

In particular, situational factors that were linked to disobedience in the Milgram studies on obedience to authority, and factors that increased the rate of nonconformity in Asch's study on group behaviour are examined to explain behaviour. In modern social psychology, the interactionist approach to understand and explain behaviour embodies the theory of external (social) and internal (individual) interaction (Turner & Oakes, 1986). In the same vein, the chapter also explores what is known about internal factors from psychology. On the individual level, a person's cognitions, self-image, and (self-) reported personal experiences can help explain why individuals may have behaved a certain way. Yet, in social psychology external moderators have been more dominant in the explanations for behaviour as they are controllable, changeable, and measurable, while internal moderators are not only difficult to assess but it remains unknown to what extent the interaction between the social influences and the individual determine the outcome. In addition to the social psychological forces that impact upon individuals who are asked to carry out immoral demands, soldiers are also embedded in a highly specific institutional context which is designed to influence and control each member's decision-making process.

### ***Chapter Three: The individual in the context of the military institution***

Chapter Three elucidates how the military institution and the particularities regarding the conflict may further impact upon individual soldiers, as well as highlighting the social forces and cognitive processes mentioned earlier. Through recourse to theoretical literature on military institutions, as well as monographs about soldiers' experience of military training and war, the chapter seeks to add to extant knowledge on soldiers' experiences through illustrating how the social psychological moderators discussed in the prior chapter are further

manifested in the institution and how the social and the war context can contribute to soldiers obeying orders (Bandura, 1999; Grossman, 2009; Holmes, 1985; Ricks, 2007; Soeters, Winslow, & Weibull, 2003).

By explaining influences on soldiers in the military and psychological processes that soldiers are likely to undergo when deployed, the chapter seeks to crystallise mechanisms which may have failed to work and therefore the individuals in question were not *enabled* to obey orders to harm others.

#### ***Chapter Four: Toward a theoretical framework of conscientious disobedience***

In Chapter Four, first a taxonomy of conscientious disobedience is proposed, which studies the ways in which the behaviour or *responses* of soldiers who refuse to obey illegal orders can be distinguished. In particular, it is stressed that when it comes to how soldiers disobey, one can find divisions, for example between direct and indirect, or evasive forms, as well as between immediate (*stage 1*) and delayed (*stage 2*) responses. Historical cases and examples of conscientious disobedience are used to analyse a variety of possible responses. While the various examples cited in the taxonomy of conscientious disobedience delineated in Chapter Four serve to distinguish between the ways that soldiers disobeyed their orders, they do not explore in-depth the possible reasons for their behaviour. The taxonomy is based on an extensive literature review, which led to a selection of cases of conscientious disobedience that demonstrate different features of the conscientious disobedient responses to an illegal order.<sup>19</sup>

The conduct of a soldier who literally confronts his or her superior immediately upon receiving an illegal order is different from that of a soldier who deserts from the military after returning to their home country from a mission in which he or she has received an illegal order. If both soldiers were driven by conscientious motivations (the latter deciding that they will never have to carry out an illegal order again), then, they are both relevant, but the present approach solely focuses on the immediate forms of refusal (*stage 1*). This is because, in the delayed forms, a clear or causal link between an illegal order and a response like desertion is more difficult to establish.<sup>20</sup> In the final section of the chapter, elements from the previous chapters are combined in a theoretical framework of conscientious disobedience. The framework proposes to study interactive factors in three dimensions which can contribute to

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<sup>19</sup> The number of recorded Wehrmacht soldiers who disobeyed illegal orders is likely greater than the number in other contexts, in which the illegality of the order is not clear or manifest, and the German “Vergangenheitsbewältigung” of World War II can lead to a multitude of available case studies. For example, the dataset of the SS troops of Battalion 101 were studied by two scholars (Browning, 1992; Goldhagen, 1996). Furthermore, a search via the VU University Library search icon produced just under 13.000 books about the Wehrmacht.

<sup>20</sup> Numerous cases of delayed response related to illegal wars, rather than illegal orders per se (*ius ad bellum* versus *ius in bello* cases). This form of conscientious disobedience is related, in theory, to the topic in a way that deserves further attention, but in practical terms, desertion and the application for the status of conscientious objection can bring about many other consequences for the individual. Particularly in the case of “illegal” wars, the soldier might also be motivated by other factors than conscientious reasons.

why a soldier disobeys, while the taxonomy distinguishes ways of *how* soldiers might disobey.

### ***Case studies in Chapters Five and Six: Analysis of archival and empirical data***

In Chapters Five and Six, the study seeks to take steps towards applying the proposed theoretical framework to analyse archival and empirical data on soldiers receiving illegal orders. As has been indicated, the present study aspires to show how an analysis of cases in this field can benefit from the theoretical framework offered in this study, in particular to explain the behaviour of *conscientious refusers* – *i.e.*, soldiers who do not want to carry out illegal orders. Relying on the method of case study research is most appropriate to investigate and understand complex and contemporary social real-life phenomena (Yin, 2009, p. 2). The case studies discussed in Chapters Five and Six were chosen due to the availability of information, their contrasting features, the nature of the orders and, in particular, the supposed (manifest) illegality of the order(s) in question. Content analysis, and in particular, document analysis was one of the main methods used to analyse documentation about the case studies because it allows for the analysis of a large variety of data obtained from archival records, documents, letters, minutes of meetings, and so on (Bowen, 2017; Nachmias & Frankfort-Nachmias, 2002, p. 324). This method is closely related to the method of observation and has been defined as “any technique for making inferences by systematically and objectively identifying the characteristics of messages” (*ibid.*).

Chapter Five discusses the atrocities committed by US soldiers in My Lai in 1968 and attempts to explain why illegal orders were obeyed by many soldiers, but disobeyed by some. The context of the Vietnam War, in particular the killing of several hundred civilians at My Lai in 1968, has been extensively studied, with manifold explanations being provided for the behaviour of the American soldiers who acted under the authority of a democratic country.<sup>21</sup> The factors that led to the issuing of illegal orders, and why, in numerous cases, soldiers perpetrated these crimes, have also been thoroughly examined (Allison, 2012; Anderson, 1998; Bilton & Sim, 1992; Hersh, 1970; Lifton, 1998; Olsen & Roberts, 1998; Peers, 1979; Wingo, 1970).

The present study revisits these previous publications. Where previous research has primarily focused on why so many soldiers participated in the murders and the subsequent abuses of the civilian population, the present research investigates soldiers who *did not* take part and why they did not.<sup>22</sup>

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<sup>21</sup> The Freedom in the World report declared the U.S. to be “free” from 1981–1991, when Freedom House started collecting data. It can be assumed that this classification holds up for the 1960’s and 1970’s as well.

<sup>22</sup> Most monographs mention Michael Bernhard, Harry Stanley, Edward Herman and Hugh Thompson, but only Hugh Thompson’s behaviour is studied in detail, even though he was not given the illegal order, but rather was an intervening bystander. The interview transcripts were studied extensively in order to find out more about the non-participating individuals.

In addition to a literature review, a systematic archival review was conducted in February 2013 of all available transcripts from the criminal investigation of the incident, as well as a review of all transcripts of the 1988/98 interviews with members of Charlie company conducted by journalists Bilton and Sim for the book and same named documentary titled “4 Hours in My Lai”, which are located at the Liddell Hart Centre for Military Archives, King’s College, London. The examined individuals presented in the chapter were selected based mainly on their self-reported disobedience.

In contrast, Chapter Six is concerned with the study of conscientious, nonconforming<sup>23</sup> border guards in a non-democratic regime (East Germany), who received a standing order to use lethal force against persons attempting to cross the border. This subject has been less studied than the case of the US soldiers in My Lai, yet the (manifest) illegality of the order and the prosecution of shooters were controversial topics in (East) Germany (Bräutigam, 2004; Diedrich, 2005; Dreier, 1997; Sälter, 2007).<sup>24</sup> Like Chapter Five, Chapter Six first explores the context, namely that of the East German regime, the position of the border guards and their mandate, before tackling resistance to carry out the orders to shoot civilians who were trying to cross the border into West Germany. The chapter aims to determine why some former guards did not want to open fire on civilians, by drawing upon both social psychological explanations of conformity and empirical data.

The study of the *firing order* and the unwillingness to follow orders of some East German guards led to an empirical search at the Military Archives in Freiburg im Breisgau in 2010 for cases of soldiers who were prosecuted for disobedience in East Germany.<sup>25</sup> Furthermore, to explore the soldiers’ perspectives on the contested illegality of their orders and their responses to it, an online survey was conducted in 2011 among 157 former East German border guards (see Appendix 1 A for more details on the approach taken and the questionnaire used). The online questionnaire included general and specific questions regarding the former guards’ experiences and their opinions both at the time and today. For the majority of the questions, the respondents could choose between a closed answer or an open-ended one, if they believed that the question either did not apply directly to them or if they felt the need to add further information to explain their answers. A limited number of respondents (three) also agreed to take part in follow-up email interviews in 2017, which helped explain why they did not want to carry out the order (see Appendix 1 B for more detailed information

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<sup>23</sup> The case study of conscientious disobedience among former border guards in East Germany includes cases of public disobedience, but also examines the reasons why some former guards who (stated that they) were never in a position to shoot, stated that they would have not shot civilians if ordered to do so. As one cannot know for sure what they would have done had such a situation arose, it seems safer to classify their behaviour as nonconforming instead of disobeying.

<sup>24</sup> While the *manifest illegality* of the order has been contested, some of the shooters have still been brought to justice, as discussed in the chapter.

<sup>25</sup> The study led to limited findings discussed in the respective chapter. Among the criminal files, no other files of former guards who were prosecuted for refusing to open fire were located. Subsequently, permission to contact a former guard who refused to shoot was not granted by the Federal Ministry of Justice, due to the fact that it was a “criminal” case and the individual’s right to privacy had to be protected.

regarding the follow-up email interviews). For an overview of the research methods and sources used, please refer to *Table 1*.

<b>Chapter</b>	<b>Methodology</b>	<b>Sources/Data</b>
<b>Chapter 1 – The duty to disobey illegal orders</b>	Legal-theoretical analysis	Legal documents (Rome Statute, UCMJ) U.S. military manuals and handbooks, international legal documents, case law and scholarly publications
<b>Chapter 2 – Social psychological factors that impact the rate of (dis)obedience and (non)conformity</b>	Literature review and analysis	Publications and monographs
<b>Chapter 3 – Institutional factors that impact upon individual soldiers</b>	Literature review and analysis	Publications and monographs
<b>Chapter 4 –Taxonomy of conscientious disobedience</b>	Literature review and analysis	Collection of cases for illustration based on monographs
<b>Chapter 5 – Case study: My Lai (Applying the theoretical framework)</b>	Description and content analysis of archival data	Monographs, studies of interview transcripts with members of Charlie company
<b>Chapter 6 – Case study: East German border guards (applying the theoretical framework)</b>	Description and content analysis of archival and additional empirical data	Monographs, review of court files from military archives, online questionnaire administered to former guards, follow-up communication with selected guards

Table 1: Outline and research methods

### III Methodological challenges

The present approach is based on studies of perpetrators in *international criminology*, as defined by Smeulers and Grünfeld (Bandura, 1999; Kelman, 1973, 1993, 2006; Kelman & Hamilton, 1989; Smeulers, 2011; Smeulers & van Niekerk, 2008; Welzer & Christ, 2005). Multidisciplinary studies are sometimes believed to constitute an inferior form of research,

due to some obstacles and limitations that result from combining divergent approaches (Phoenix et al., 2013, pp. 219-220). Obstacles in multidisciplinary research comprise the lack of a shared vocabulary and terms, the difficulty of integrating methods, as well as the differences in styles of thought (Phoenix et al., 2013, pp. 219-220). In order to address these concerns, the theoretical chapters introduce each approach in terms of its respective discipline by defining and explaining the terms and theories that are used. While the multidisciplinary approach adopted in this study allows for the inclusion of a variety of factors, the resulting multidisciplinary analysis will necessarily not be as detailed as an analysis of a case from a single perspective.

One of the main challenges in writing this study has been the limited availability of publicly accessible information about conscientious disobedience. It is not surprising that there is no abundance of such cases. The actual prevalence of disobedience can hardly be established. A social psychologist would argue that the majority of people tend to obey and conform to unjust demands. It is difficult for soldiers to stand up to authority. Furthermore, if the authority itself is directly involved in the perpetration of a crime, the soldier may face *aversive* consequences for his or her disobedience. The authorities involved in ordering illegal acts are unlikely to share detailed information about illegal orders and refusals thereof. Soldiers who did not take part in committing crimes may still refrain from incriminating their comrades, regardless of whether the authority issuing the illegal order is still in power or whether a regime change has occurred in the interim. In addition, evasive disobedience can remain a secret and unnoticed behaviour and therefore never appear in any documents or records. The present study accordingly does not aim at establishing how many soldiers conscientiously disobeyed, but rather how and why some soldiers disobeyed.

Analysing a small number of individual cases does not allow for generalisation, which constitutes an obvious limitation of the present study. However, by thoroughly investigating certain individual cases, we can begin to better understand conscientious disobedience from legal, empirical, and theoretical perspectives. While it is pertinent to examine common external factors to allow for comparison with other cases, internal or personal factors cannot be disregarded. Hence, although the emphasis lies on external environmental factors with respect to theory, the empirical section also includes a discussion of possible individual factors.

A further methodological problem stems from the use of interviews; it pertains to their retrospectivity. Accounts and explanations for responses to (perceived to be) illegal orders are only offered with hindsight, which, according to Bijleveld, constitutes “in essence an unsurmountable problem” (Bijleveld, 2017, p. 361). Further, self-reporting always includes an element of bias when explaining one’s own behaviour (Nisbett & DeCamp Wilson, 1977). According to these researchers, there is little to no direct introspective access to higher-order cognitive processes. Subjects are often not aware of what caused the response (stimulus), are unaware of the response itself, or are not aware of the fact that a response was triggered (Nisbett & DeCamp Wilson, 1977, p. 231).

Self-reporting produces implicit causal theories and judgements about what could have caused this response to the illegal order. This limitation of hindsight and self-reporting also applies to soldiers. Despite this, both the transcripts of the interviews, which recorded self-reported retrospective accounts, and the reflections from former guards enable novel research ideas to evolve, which, in turn, contribute towards a better understanding and use of a well-established body of research and the development of a new theoretical framework, especially when the researcher aims to include the self-reporting bias in the overall analysis.

The present development of the theoretical framework of conscientious disobedience constitutes a novel proposition for studying this phenomenon. The study combines elements from multiple disciplines, offers definitions and perspectives, reviews what is already known about the subject, and determines which factors to consider when examining how and why members of the military, such as Dražen Erdemović can refuse to obey illegal orders.

# **CHAPTER ONE**

## **The Legal Duty to Disobey Illegal Orders**



## Introduction

As part of his judgment in *McCall v. MacDowell* (1867), United States district judge Deady elucidated the soldier's (liability) dilemma with regards to responding to illegal orders in the following way: "Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law should excuse the military subordinate when acting in obedience to the orders of his commander." Judge Deady's deliberation then proceeded to strike at the heart of the soldier's predicament: "[Otherwise] he is placed in the dangerous dilemma of being liable in damages to third persons for obedience to an order, or to the loss of his commission and disgrace for disobedience thereto."<sup>26</sup> Some 80 years later, Chief Prosecutor Jackson of the International Military Tribunal in Nuremberg wrote in a letter to president Truman, stating "that [t]here is doubtless a sphere in which the defence of obedience to superior orders should prevail" (Hobel, 2011, p. 579).

Today, 150 years after Judge Deady's aforesaid judgement on the question of soldiers' liability, military, academic, and legal communities continue to debate this issue. Whilst soldiers undoubtedly have an obligation to obey orders, they also have a duty to disobey illegal orders. The present research is predicated on the notion that the legal duty to disobey can be deduced from the existence of soldier's individual criminal liability in certain cases. That is to say, if a soldier's obedience to orders cannot be excused by referring to his or her duty to obey, then they have had a duty to disobey. A soldier's duty to disobey illegal orders can thus be regarded as a counterpart to individual criminal liability. This raises the following question, which this chapter sets out to address: in what circumstances is a soldier liable for the acts committed under orders?

Indeed, many German soldiers and civilians unsuccessfully attempted to defend their participation in the Holocaust by claiming that they were merely following orders that had to be obeyed (Milgram, 1974; Smeulders & Grünfeld, 2011). Evidently, the circumstances are different for military personnel than for their non-military counterparts. Soldiers are first and foremost legally obliged to obey orders and breaking the chain of command entails a clear rejection of this duty. While there is perhaps a moral obligation to disobey illegal orders at all times, from a legal perspective, one could argue that a soldier's legal duty to obey orders turns into a duty to *disobey* orders, if the soldier can be held responsible for committing crimes as a result of following these (illegal) orders.<sup>27</sup> Within contemporary societies, the legal duty of a soldier to disobey illegal orders may be seen as a taken for granted obligation, at least from a "Western" perspective (Osiel, 1999). Conversely, the question of *how* soldiers should deal with immoral orders remains the source of considerable debate, as will be

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<sup>26</sup> *McCall v MacDowell et al.*, Federal Case no 8.673; April 25 1867, Circuit Court D. California.

<sup>27</sup> It is important to draw a distinction between ordinary crimes and crimes of obedience. As opposed to ordinary crimes, which are the result of a deviant individual misbehaving, a crime of obedience occurs when a deviant authority condones or instigates the perpetration of a crime and submissive individuals obey. Kelman and Hamilton (1989) coined the term crimes of obedience, which are intrinsically linked to illegal orders.

discussed below. While the legal obligation may indeed instil a legal duty within each individual soldier, scholars must examine where the particular turning point is, and whether or not it is fair to expect soldiers to identify and act upon their respective duty to obey or disobey.

First, in section 1.1 the chapter delineates three existing approaches to understanding the individual criminal responsibility of soldiers, which, in turn, gives rise to three respective duties to (dis)obey. Historically, the military relied on soldiers to carry out their orders without question; from this perspective, it is the superior who ultimately bears the responsibility for the execution of orders, while the soldier has no legal duty to disobey. In the aftermath of the crimes committed in World War II, a second approach emerged which was predicated on the principle of complete or absolute responsibility, that is, soldiers always bear the responsibility for illegal actions, and, as such, have a legal duty to disobey illegal orders. A third approach posits that soldiers should not have to determine the lawfulness of every order they receive, but rather should only bear criminal liability for those that are most obviously illegal, which results in a conditional duty to disobey.<sup>28</sup> Through recourse to both a national and international perspective, the aims of the present chapter are two-fold: firstly, it defines the concepts of *illegal orders* and the *duty to disobey*; and secondly, it clarifies the respective legal perspectives that prescribe in which cases soldiers are legally duty-bound to disobey orders.

With respect to analysing a contemporary national perspective, the U.S. military approach to the duty to disobey illegal orders has been selected to demonstrate the soldier's dilemma within the largest traditional, and most powerful, active armed services.<sup>29</sup> In contrast, the chapter also briefly delves into the German Bundeswehr, which constitutes a smaller, less powerful and more reluctant armed service, with a markedly different approach to the duty to disobey, which thus makes it a worthwhile comparison (Junk & Daase, 2013). The chapter proceeds to discuss how an analysis of the U.S. domestic perspective on illegal orders allows for expedient distinctions to be drawn between various types of wrongful orders, as well as providing insight into how the military institution defines orders, unlawful orders, illegal orders, and soldiers' respective duties in section 1.2.

Finally, the chapter ends with a comparison of the soldier's duty in the international criminal legal framework in section 1.3. The international (Western) legal community has established military principles and defined the most obvious types of illegal orders as those that lead to international crimes (Osiel, 1999). These crimes comprise the crime of genocide, crimes against humanity, war crimes and crimes of aggression. During the Nuremberg Trials of high-ranking Nazi officials and military personnel, it became clear that the orders given by Hitler

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<sup>28</sup> A brief clarification regarding the legal terms used: liability has been chosen rather than culpability, because the soldier who receives an illegal order does not (necessarily) have criminal intent. If he acts as instructed and carries out the illegal order, then he might be partly responsible (liable), whereas the degree of culpability appears to better describe the blameworthiness of an individual who wants to carry out a crime.

<sup>29</sup> See, for example, the ranking on the website of the Business Insider (Bender, 2014).

and his subordinates were so heinous that no excuse on the grounds of superior orders could be granted (e.g. crimes contributing to the Holocaust), which suggested that soldiers have an absolute duty to disobey orders to commit international crimes.<sup>30</sup> The chapter unpacks what the four types of international crimes entail for illegal orders, before proceeding to examine soldiers' respective duties to disobey orders to commit these international crimes.

## 1.1. Approaches to individual criminal liability and the duty to disobey

The traditional approach to conceptualising soldiers' individual criminal responsibility is known as *due obedience* or *respondeat superior*, which exempts the soldier from all individual criminal responsibility (Dinstein, 1965, p. 39). In those cases where soldiers follow orders and engage in an illegal act, they can according to this doctrine successfully invoke the defence of superior orders.<sup>31</sup> Hence, their superior bears all responsibility (i.e. *respondeat superior*) for the illegality of the action. Accordingly, the soldier has a duty to obey illegal orders. In the same vein van Sliedregt describes this approach as follows: "If members of the armed forces commit violations by order of their government, they are not war criminals," and, in slightly different words: "[I]n case members of forces commit violations ordered by their commanders, the members may not be punished, for the commanders alone are responsible" (van Sliedregt, 2012, p. 214). The *respondeat superior* principle is thus intended to guard against soldiers second-guessing the decision-making of their superiors. At the social level, it supports the hierarchical structure, while, at the strategic level, it enables the military to operate more effectively (Keijzer, 1978, p. 151).

Consequently, every cog in the machine must function without delay or derogation, a principle that relieves the soldier of the responsibility to decide what they ought to do. Rather, the soldier is simply expected to do as told. In previous times, any disobedience could immediately result in a summary death penalty, irrespective of the lawfulness of the refused order, as was decided in *Clark v. State* (1867): "The act was ordered by an officer in command, and the private could not but obey. What also did he dare to do? He cannot stop

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<sup>30</sup> At the time the Holocaust was perpetrated, a wide range of orders contributed to the systematic extermination of Jews (and other groups), as will be discussed later (see Chapter Three); euphemisms were used to disguise the cruel intent, such as the Holocaust being referred to as the "Final Solution", which served to frame the act as a positive answer to a problem. This allowed perpetrators to see themselves in a positive light as being akin to problem solvers.

<sup>31</sup> If a soldier committed a crime without having been ordered to do so, then he would be held responsible by the appropriate military justice system. In other cases, the superior officer, who may not have given the order to engage in unlawful action may still be responsible for the actions of his or her subordinates, as the officer is obligated to be aware of what his troops are doing (command & control), a concept that is interlinked with the need for discipline and loyalty. Moreover, in contemporary societies, superiors can generally be held responsible for negligence if they knew, or should have known, that their subordinates were committing crimes, as they are in command and bear superior responsibility. States should adopt all necessary measures to ensure adherence to the GCs, see: Article 86 API Geneva Convention and Article 6/7 (3) of the ICTR/Y Statute, as well as Article 28 of the ICC Statute.

to question the authority of his superior. Obedience or death are the alternatives in military government in such cases” (Keijzer, 1978, p. 158).<sup>32</sup>

Conversely, international criminal law can also prescribe absolute individual criminal responsibility for involvement in certain crimes. As the word *absolute* implies, there is no defence of superior orders for someone charged with committing such crimes, and, accordingly, there is no derogation from the duty to disobey. Due to the gravity and nature of the crimes perpetrated by the Nazis both prior to and during World War II, the international legal community came to view individuals following orders to perpetrate crimes as malevolent. In particular with regard to the crime of genocide one could no longer rely on the defence of superior orders. Indeed, the German legal philosopher Radbruch (1878-1949) even went so far as to argue that some crimes are so heinous that no existing legal system can legitimately claim that the orders to perpetrate them are legitimate (Dreier, 1997, p. 421). Consequently, this (natural law-based) legal approach prescribes that certain orders can never be legal, regardless of attempts by the requisite national instruments to legalize them. Whilst the application of a hierarchy of laws (*ius cogens*) was not exclusive to the Nazi trials, it took on increased prominence because the defence of superior orders was put forward on such a massive scale in the immediate post-war period.<sup>33</sup>

The 1945 London Agreement establishing the Nuremberg Tribunal codified this second, absolute approach to soldiers’ liability.<sup>34</sup> The drafters established that the plea of *superior orders* could never constitute a complete defence for certain crimes, but rather could only be used as a mitigating factor in the sentencing phase. In Article 6 of the Charter establishing the Nuremberg Tribunal, it was specified that a “Defendant act[ing] pursuant to order of his Government or of a superior shall not free him from responsibility but may be considered in mitigation of punishment”.<sup>35</sup> The so called Nuremberg Principles were further enshrined by the UN General Assembly, which “[a]ffirms the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal” in 1946.<sup>36</sup>

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<sup>32</sup> In Keijzer’s comparative analysis, he found that even at that historical juncture more than merely the respondeat superior principle was applied in cases where soldiers were tried for disobeying unlawful orders. It is important to stress here, that if the orders were manifestly unlawful, and superiors had the discretion to administer summary capital punishment, then relatively few criminal cases would have even made it before a military jury. The aforesaid principles of full and conditional individual criminal responsibility were also applied by courts prior to the Nuremberg Principles.

<sup>33</sup> Bassiouni defines *ius cogens* as the legal status that certain international crimes reach, which bring about certain obligations for all states, including the duty to extradite, the non-applicability of statutes of limitations for such crimes, the non-applicability of the defence of “obedience to orders” (save as mitigation of sentence), the universal application of these obligations, ... and universal jurisdiction over perpetrators of such crimes (Bassiouni, 1997, p. 63). “...a *ius cogens* norm holds the highest hierarchical position among all other norms and principles,... and is deemed to be ‘peremptory’ and ‘non-derogable’” (Bassiouni, 1997, p. 67).

<sup>34</sup> This principle was confirmed in Article 6 of the Charter of the Tokyo Tribunal (1946).

<sup>35</sup> With this new approach, complete exemption from criminal liability was transformed or, more specifically, reversed into complete liability. Osiel argues that because only the highest-ranking Nazis were prosecuted under the Nuremberg Tribunal, there was no need to deal with due obedience claims for lower echelon officers (Osiel, 1999, p. 42).

<sup>36</sup> Even though the UN did not formally adopt these principles, they are nevertheless regarded as recognizing the international individual liability principle see General Assembly Resolution 95(I), 1946, in (van Sliedregt, 2012, p. 61).

The third and most widely applied legal approach for addressing the issue of soldiers' liability is referred to as conditional or limited liability, and can be summarised as such: a soldier is only responsible for acting under orders if he knew the order to be illegal (Gaeta, 1999; Keijzer, 1978; Osiel, 1999; van Sliedregt, 2012). The conditional duty to disobey constitutes a compromise between absolute liability and the absence of liability. Article 33 of the 1998 Rome Statute<sup>37</sup> that established the International Criminal Court stipulates that:

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
  - a. The person was under a legal obligation to obey orders of the Government or the superior in question;
  - b. The person did not know that the order was unlawful; and
  - c. The order was not manifestly unlawful.
2. For the purpose of this Article, orders to commit genocide or crimes against humanity are manifestly unlawful.<sup>38</sup>

Soldiers are required by law to obey orders. Therefore, the first part of Article 33 allows for the exclusion of persons, civilian or military, who do not have a duty to obey orders, but nevertheless attempt to rely on this defence. Secondly, the article allows the accused to make a plea based on the superior orders defence, if they can demonstrate that they were not cognisant of the fact that the act they carried out was indeed illegal. The issue of what a soldier may know regarding the unlawfulness of his orders will be discussed in greater detail below. In the interpretative guidelines published by the ICC, titled *Elements of Crimes*, it is outlined that knowledge of a crime is not something that must be proven in court, but rather can be derived from circumstantial evidence related to one's military position and the requisite knowledge they should have (Schabas, 2010, p. 156). Thirdly, Article 33 stipulates that the superior orders defence cannot be invoked if the order was *manifestly illegal*. *Manifestly illegal* is defined in sub-point 2 as (including) *orders to commit genocide or crimes against humanity*. Accordingly, the Rome Statute offers the first definition of manifestly illegal orders, that is, orders which should incite soldiers to invoke their duty to disobey, which will be discussed in greater detail below. To arrive at a comprehensive

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<sup>37</sup> The Statute established the (permanent existence of the) International Criminal Court (in The Hague), in which under Article 5 of the Statute, the crime of genocide, crimes against humanity, war crimes and the crime of aggression are listed as crimes that fall under the court's jurisdiction. The article reads: 1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression. 2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

<sup>38</sup> In addition to the Rome Statute, other Ad Hoc tribunals also contained comparable principles, such as Article 6 of the International Criminal Tribunal for Rwanda (ICTR) and Article 7 of the International Criminal Tribunal for the former Yugoslavia (ICTY) Statutes, respectively.

definition of the duty to disobey, and subsequently of *illegal orders*, a domestic legal approach is adopted, because domestic documents provide more concrete definitions of these terms.

### 1.1.1. The U.S. approach to soldiers' duty to disobey

In order to understand the soldier's *duty to disobey* from a domestic perspective, it is expedient to investigate how the military institution defines *duty* more generally. Duty can be understood as: (1) something that is done as part of the job; (2) something that one must do because it is morally right or because the law requires it; or (3) as something which refers to active military service.<sup>39</sup> Obviously, the third connotation of duty is not the one we are interested in here. Rather, the first and second definitions constitute a crucial element of the present analysis, and will be unpacked in greater detail through recourse to military definitions in an attempt to answer the following question. How should the duty to disobey illegal orders of soldiers be properly understood? Is it part of their job description or is it merely an additional moral or legal requirement?

Unsurprisingly, the U.S. military provides its personnel with numerous handbooks, manuals and guidelines to help them interpret their duties. For example, one of these handbooks is the 2011 "Soldier's Guide", Field Manual 07-21.13 (FM 07-21),<sup>40</sup> which distinguishes between directed, specified and implied duties.<sup>41</sup> Directed duties are not specified as part of one's job description or associated with other directives. A superior administers duties either orally or in writing (Chapter 4, Article 8, FM 07-21.13). Directed duties comprise, *inter alia*, being in charge of quarters (CQ). Specified duties overlap with standing orders, in that they are generally applicable to a certain group of people or a certain type of situation (Chapter 3, Article 9, FM 07-21.13). These first two meanings fall under the tasks that soldiers must do as part of their job and, as such, constitute the first definition of duty.

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<sup>39</sup> See, for example, the definition given by the Merriam Webster dictionary.

<sup>40</sup> As is stated in the foreword: "This Soldier's Guide applies to every soldier in the Army—active, reserve, and National Guard—in every rank and MOS. It condenses important information from a number of Army Regulations, Field Manuals, DA Pamphlets and other publications. This manual describes your role in the Army, your obligations, and what you can expect from your leaders. Other subject areas are Army history, training, and professional development. This manual also describes standards in appearance and conduct and selected individual combat tasks that are important for every Soldier to master. This manual gives you a good reference to find answers for many questions. It helps clarify and reinforce standards and helps prepare you to assume leadership positions. Read it thoroughly and continue to do the great work American Soldiers have done for almost 230 years".

<sup>41</sup> FM 07-21, Chapter 3-11. Reads: Implied duties often support specified duties, but, in some cases, they may not be related to the military occupational specialty (MOS) job position. These duties may not be written but implied in the instructions. They are duties that improve the quality of the job and help keep the unit functioning at an optimum level. In most cases, these duties depend on individual initiative. They improve the work environment and motivate soldiers to perform because they want to, not because they have to.

The Soldier's Guide prescribes the following in Chapter 3(2):

Duties are general requirements to be performed. Duty begins with everything required of you by law, regulation, and orders; but it includes much more than that. A duty is a legal or moral obligation (FM 07-21-13).

In the above citation, the Soldier's Guide notes that duties can also constitute a legal or moral obligation. The legal duty prescribes what one ought to do to prevent legal consequences. For example, obeying lawful orders is a legal duty, see Article 90 of the 1956 Uniform Code of Military Justice: not obeying orders can result in legal consequences. A soldier's moral (non-legal) duty, conversely, is a normative duty that prescribes what one ought to do because it is the *right thing* to do; it has no legal consequences if it is not acted upon. A moral duty, for example, can be understood in terms of the aforesaid *implied duty*. An implied duty would involve non-commissioned officers *leading by example*.<sup>42</sup>

If a soldier fails to act on his or her moral duty, they might also face disciplinary action. The ideal situation, of course, would be for legal duty to overlap with moral duty, that is, actions that a soldier must undertake by law should also be the right thing to do.<sup>43</sup> However, neither all actions that are desirable (or should be done) are also required by law, nor are all legally required actions in and of itself right from a moral perspective. Whilst the Soldier's Guide does not include an explicit reference to the duty to disobey, it does underscore soldiers' liability on this issue under the heading of *Defence of Superior Orders*:

3-155. The fact that the law of war has been violated even if on the order of a superior authority, whether military or civil, does not change the act in question of its character as a war crime. It does not constitute a defence in the trial of an accused individual unless he did not know and could not reasonably have been expected to know that the act was unlawful. In all cases where the order is held not to constitute a defence to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.

3-156. In considering the question of whether a superior order constitutes a valid defence, a court-martial takes into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces. At the same time, remember that members of the armed forces are bound to obey only lawful orders.

The message the Soldier's Guide appears to impart to the soldier can be summarised as follows: if you are ordered to perpetrate (war) crimes, you cannot be excused for the actions by referring to the fact that you were ordered to do so. Unless you did not know that what

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<sup>42</sup> See: Command Sgt. Maj. William R. Kryscnski on Implied Duties, *Guardlife*, Vol 32, issue 4.

<sup>43</sup> However, as the MCM notes, a soldier's conscience is insufficient grounds for disobeying orders. See the section on illegal orders below for more on this issue.

you did constituted a crime. However, the courts-martial will take into account that you have to obey orders. In the United States, the duty to disobey illegal orders is thus not explicitly spelled out to the soldier. Rather, in this case the duty to disobey has to be inferred from (1) the fact that the soldier may be held responsible for illegal actions that resulted from obeying orders, as discussed above and (2), the fact that the soldier is exempt from legal penalization for disobeying unlawful orders, which will be discussed in detail below. Presumably, then, the soldier is expected to combine these two points to understand the duty to disobey illegal orders.

Yet, before a defence of superior orders can be invoked, the courts-martial proceedings have to be initiated in the first place. It is therefore necessary that the committed crimes have been reported to the Inspector General by either a witness or the perpetrator himself. A witness who is not a member of the armed forces (e.g., a bystander or possibly a victim) must have access to the reporting system, which is not necessarily granted. By contrast, a bystander who is a member of the armed forces can report crimes. However, not unlike a whistle-blower, a soldier must incriminate comrades and superiors in the process. Alternatively, perpetrators would have to incriminate themselves, subsequent to obeying the illegal order. The consequences of both incriminating people within one's own professional environment and implicating members of one's social group are difficult at best.<sup>44</sup> As the next paragraph will show, the domestic duty in the United States is not representative of other national approaches towards the duty to disobey illegal orders.

### 1.1.2. The German approach to soldiers' duty to disobey

By contrast, the German Bundeswehr's approach towards the duty to disobey constitutes an expedient example to which the current criticism of the shortcomings of the duty to disobey do not apply as extensively. This is because the *German Wehrgesetz* does not only literally stress the soldier's duty to disobey in the very same paragraphs in which the soldier's expected obedience is outlined (Article 11, (1) and (2) respectively, *Soldatengesetz*, 2005)<sup>45</sup>, but it even encourages soldiers to rely on their conscience when deciding to break the chain of command. Should soldiers have good reasons to (even wrongfully) believe an order to be illegal, they will not be (held) liable for disobeying orders. Even in a case where a member of the Bundeswehr refused to allow the software he developed to be used in a war that he considered to be unlawful, he was found not guilty of disobedience.<sup>46</sup> The stark contrast between the German and United States armed forces on this issue can be explained via

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<sup>44</sup> Chapter Three deals with the environmental and institutional factors in greater detail.

<sup>45</sup> See Article 11 of the Soldaten Gesetz: Gehorsam - (1) Der Soldat muss seinen Vorgesetzten gehorchen. Er hat ihre Befehle nach besten Kräften vollständig, gewissenhaft und unverzüglich auszuführen. Ungehorsam liegt nicht vor, wenn ein Befehl nicht befolgt wird, der die Menschenwürde verletzt oder der nicht zu dienstlichen Zwecken erteilt worden ist; die irrige Annahme, es handle sich um einen solchen Befehl, befreit den Soldaten nur dann von der Verantwortung, wenn er den Irrtum nicht vermeiden konnte und ihm nach den ihm bekannten Umständen nicht zuzumuten war, sich mit Rechtsbehelfen gegen den Befehl zu wehren.

(2) Ein Befehl darf nicht befolgt werden, wenn dadurch eine Straftat begangen würde. Befolgt der Untergebene den Befehl trotzdem, so trifft ihn eine Schuld nur, wenn er erkennt oder wenn es nach den ihm Artikel 62 Absatz 1 und Artikel 63 des Bundesbeamtengesetzes entsprechend.

<sup>46</sup> See: Befehlsverweigerung aus Gewissensgründen rechters, in: Frankfurter Allgemeine Zeitung of 22.06.2015.



historical events.<sup>47</sup> The Bundeswehr learned both that soldiers had to take greater responsibility for their individual actions and that authorities are indeed capable of being involved in *crimes of obedience*.<sup>48</sup>

After World War II, the Nationale Volksarmee (National People's Army) of East Germany also adopted the conditional liability approach to the duty to disobey (at least on paper), albeit without the above discussed additional paragraphs in the West German version pertaining to the necessity of ensuring that orders are legal. Article 35 of the Additional Code to the Criminal Law (of 1957) of the German Democratic Republic only made disobedience to orders a punishable offence, if "the order did not violate the Criminal Code, international law or dignity of people of the farmers' and workers' state".<sup>49</sup> However, the actual concrete application of the right to or duty to disobey (alongside manifold other rights) was in stark contrast to the prescriptions on paper, as will be discussed in Chapter Six in relation to East Germany. It should be noted that the present chapter focusses on juxtaposing the U.S. military justice system with the international criminal law approach, and, therefore, the critique is only applicable to other domestic systems in which comparable legislations prescribe similar duties to soldiers. As indicated, the fact that the duty to disobey illegal orders can be understood as a bottom-up responsibility of soldiers is, in the case of the United States, not literally expressed. Orders, by contrast, are top-down demands to take action. If soldiers ostensibly have a duty to disobey illegal orders, then they need to be able to discern for themselves what illegal orders are, which will be explained in the subsequent section.

## 1.2. Illegal orders - The U.S. military law perspective

Military law has numerous functions and applications in its capacity of regulating the military judicial system. It criminalizes illegal acts and dictates how transgressions are to be punished. Military law includes legal instruments such as the Uniform Code of Military Justice (1956) (UCMJ) in the United States, the British Army Act (1955) or the German *Soldaten Gesetz* (2005). One of the first and most extensive Military Code of Articles was instantiated by King Gustavus Adolphus of Sweden in 1621, which not only meticulously codified offences but also prescribed punishments within the 167 articles, including articles regarding the treatment of civilians, i.e. respecting persons, property rights, or institutions (Rollman, 1969, p. 214).

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<sup>47</sup> Interestingly, on paper at least, Wehrmacht soldiers were also only duty-bound to follow lawful orders. Statutory provision of Section 47 of the Military Penal Code stated that subordinates could only be held responsible for obeying orders if they had known the order to be illegal (Dinstein, 1965, p. 12).

<sup>48</sup> As defined in the introduction, crimes of obedience refer to crimes that are instigated or condoned by an authority (Kelman & Hamilton, 1989).

<sup>49</sup> See Article 35: Befehlsverweigerung. (1) Wer einen von einem Vorgesetzten erteilten Befehl nicht ausführt oder die Ausführung des Befehls verweigert und dadurch einen erheblichen Nachteil für die Disziplin, Ausbildung oder Einsatzfähigkeit der Einheit herbeiführt, wird mit Gefängnis bestraft. Wer einen Befehl nicht befolgt, dessen Ausführung gegen die Strafgesetze oder gegen das Völkerrecht verstoßen oder die im Arbeiter-und-Bauern-Staat geltende Achtung des Menschen verletzen würde, bleibt straffrei. The order was later slightly adjusted, see Chapter Six.

First and foremost, national codes were established to govern troops and ensure their adherence to commanders. Strict control and oversight over military personnel is absolutely necessary, because, on the one hand, soldiers are expected to give their lives on the battlefield, while, on the other hand, soldiers carry lethal weapons and can cause immense harm to others. Accordingly, to deter soldiers from disobeying, defiance is punished harshly. The primary focus of national military codes can thus be considered to be introverted, in the sense that they deal with transgressions within military institutions or with *internal* offences amongst their ‘own’ military personnel. These include misdemeanours as well as a host of other offences, such as desertion, cowardice, or violence against superiors. Both historically, and, to a lesser extent, in the present time, justice was administered summarily by superior command (Rollman, 1969, p. 212). However, the present study is primarily concerned with *external* transgressions of military regulations, such as crimes being committed against foreign populations or opposing armies.

In order to both define illegal orders and to understand soldiers’ domestic duty to disobey, the most relevant legal instruments in the United States will be analysed. First, the 1956 Uniform Code of Military Justice<sup>50</sup> will be discussed, as it constitutes the backbone of military law and contains punitive articles, in particular in Articles 77 through 134. Second, the 2012 United States Manual for Courts-Martial, (hereafter MCM) is consulted, as it constitutes the official guide for how to apply and interpret military law and justice. Other relevant army publications that have been considered include the above-mentioned *Soldier’s Guide* (FM 07-21.13 2014), the *Joint Publication Dictionary JP-1-02* (2014), the *Army Command Policy* (RG 600-20, 2012), as well as the *Operational Handbook* (FM 27-10, 1976). Although the terms unlawful and illegal may seem interchangeable, I will propose and argue below that unlawful orders encompasses a broader category of orders to which no duty to disobey exists, while illegal orders refer to a specific type of unlawful orders, in relation to which a duty to disobey does exist.

### 1.2.1. Orders

The military organization relies upon subordinate members obeying the orders of their superiors. An order can be understood as a request from an authority,<sup>51</sup> requiring either an action or demanding to abstain from taking a certain course of action. Within U.S. Army Regulations, “orders” or “commands”<sup>52</sup> have been defined in the Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms (hereafter JP 1-02) as:

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<sup>50</sup> The official title is the United States Code (of Laws), Title 10 (Armed Forces), Chapter 47, the Uniform Code of Military Justice.

<sup>51</sup> According to the Soldier’s Guide’s explanation of the hierarchy and the chain of command, it is essential that the authoritative instance has more power and influence over the receiver and the ability to apply sanctions.

<sup>52</sup> The first definition of command refers to command authority (1): “The authority that a commander in the armed forces lawfully exercises over subordinates by virtue of rank or assignment. Command includes the authority and responsibility for effectively using available resources and for planning the employment of, organizing, directing, coordinating, and controlling military forces for the accomplishment of assigned missions. It also includes responsibility for health, welfare, morale, and discipline of assigned personnel”.

An order given by a commander; that is, *the will* of the commander expressed for the purpose of bringing about a particular action (JP 1-02, p. 65).

This definition contains four elements, which will be unpacked in turn below: (1) the *will*; (2) *of the commander*; (3) *expressed*, and (4) *for the purpose of bringing about a particular action*.

(1) *The will*. A *will* can be distinguished from a specific demand, in that the former is a desire or intent while the latter term entails a literal request, a dictate, or an instruction. Defining an order as a *will*, the United States definition also includes demands that are not necessarily literally expressed by the commander, but rather vague actions that are desired and possibly expected by him. For example, the commander wants his subordinates to do their job as good as they can, but he may not (need to) express this desire in a clear-cut fashion, which leaves room for interpretation on behalf of the soldiers.

(2) *Of the commander*. The commander is always the superior officer or warrant officer who has been placed in charge of subordinated personnel and territory.<sup>53</sup> There is only one chain of command in the military, with the commander-in-chief sitting at the very top of the hierarchy, who in the United States is the President. The chain of command establishes a clear line of superiority from the top right down to the lowest echelons. While soldiers have to answer to their immediate superiors, and at times to their platoon leaders, a soldier does not have to answer to a command from a soldier of equal status.

(3) *Expressed*. Expressions of *superiors' will* include (1) oral commands and (2) written documents. Oral expressions, such as "*at ease!*", are ordinarily accompanied by an exclamation point and can be directed at individuals or groups. Written orders can constitute specific instructions of what to aim for on the strategic, operational, and tactical levels. In the United States, official forms of orders are called *Department of Defence Issuances*.<sup>54</sup> They include *Directives*, *Regulations*, *Manuals* and are subject to frequent review, updating and publication.<sup>55</sup> For example, in a given combat zone, the *Rules of Engagement* (RoE) are:

Directives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered' (JP 1-02, p. 347). The MCM further explains apropos the *form of transmission of the order*: "As long as the order is understandable, the form of the order is immaterial as is the method by which it is transmitted to the accused" (MCM 14 c (2)(c)).

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<sup>53</sup> The Army Command Policy prescribes in (1–5. Command) *a. Privilege to command*. Command is exercised by virtue of office and the special assignment of members of the United States Armed Forces, who hold military grade and are eligible to exercise command. A commander is, therefore, a commissioned or WO, who, by virtue of grade and assignment, exercises primary command authority over a military organization or prescribed territorial area that under pertinent official directives is recognized as a "command.". See AR 600-20.

<sup>54</sup> Official Department of Defence Issuances include six subtypes: Directives, Instructions, Manuals, Directive-Type Memorandums, Administrative Instructions and Department of Defence publications, note that the latter have to be transformed into Manuals upon their next publication (DOD Instructions Number 5025.01).

<sup>55</sup> See official webpage for all Department of Defence Issuances.

(4) *For the purpose of bringing about a particular action.* The particular action that is desired by the commander can embody a broad goal, such as, for example, *to exercise control and order*. It can also refer to a specific task or one explicit action, such as *to attack the village with mortar fire at 05:00 from position A*. In some instances, it may not explicitly state how to execute the action; for example, when the order is not clear about the means or is only implicitly stated. In other cases, the order may specifically instruct engaging in a particular course of action. Each required particular action may be translated into a collection of actions, and subsequently embedded in regulations which are “generally applicable to an armed force and which are properly published by the President or the Secretary of Defence, of Homeland Security, or of a military department and those orders or regulations generally applicable to the command of the officer issuing them” (MCM, 16, (c) 1 (a)).

Military orders thus encompass various forms of superior instructions to act or to do as intended by the commanding person. Orders do not have to be literal or be transmitted in a prescribed format. The fact that the U.S. military definition of orders includes all forms of transmission leaves space for superiors to formulate their instructions in such a way that, at a later stage, they can distance themselves from subordinates’ interpretations of their will. For example, to “take care of the prisoners” is an order that may imply various actions; for example, that the prisoners be fed or guarded, or that they are to be interrogated and treated harshly. Whether the order is clear to the soldier depends to a large extent on the circumstances of the situation. Within a specific context, the soldier must figure out what the order really means, whereas the superior who issued a vague order can claim retrospectively that his intentions squarely remained within extant ethical and legal boundaries, and that his soldiers thus misunderstood him. The superior, however, does bear the responsibility for the actions of his subordinates and thus must ensure himself that his orders are neither too vague nor misleading.<sup>56</sup>

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<sup>56</sup> The commander bears responsibility for the command: he has to ensure that his subordinates execute his orders appropriately but also beyond that, anticipate crimes that may be committed under his command. Commanders are, to some degree, liable for their subordinated personnel. See AR 600-20 Army Command Policy Chapter 2.1: “*b*. Commanders are responsible for everything their command does or fails to do. However, commanders subdivide responsibility and authority and assign portions of both to various subordinate commanders and staff members. In this way, a proper degree of responsibility becomes inherent in each command echelon. Commanders delegate sufficient authority to Soldiers in the chain of command to accomplish their assigned duties, and commanders may hold these Soldiers responsible for their actions. Commanders who assign responsibility and authority to their subordinates still retain the overall responsibility for the actions of their commands.” Also see FM 27-10 Rule 501. Responsibility for Acts of Subordinates: “In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to ensure compliance with the law of war or to punish violators thereof”.

### 1.2.2. Wrongful, lawful, unlawful, and illegal orders

This study will also use the term wrongful orders. The adjective *wrongful* typically refers to “not fair, not just or not legal” and is commonly used in a legal context (Oxford, 1995). *Wrongful orders*, according to the Oxford Dictionary, comprise orders that are either *unlawful*, that is *not allowed, recognised, or required by law* (Oxford, 1995), or *immoral*, that is *not following accepted standards of morality, or a set of principles of right and wrong* (Oxford 2005) (including the above said just and fair), or both.<sup>57</sup> The set of principles may derive from a personal, group, institutional, or social level. It is important to distinguish between these types of wrongful orders. How the different orders and their respective sub-categories can be understood is discussed below as it pertains to the study of conscientious disobedience. All wrongful orders, irrespective of the legal or moral source, can affect the soldier’s conscience and trigger an unwillingness to obey the order.

In order to untangle the different terms, the present exploration primarily leans on U.S. military documents to derive a meaning of each adjective. *Lawful* orders are not explicitly defined in any regulation. As the notion *lawful* suggests, it can be concluded that all orders that are not in conflict with any higher law or legal instrument are deemed to be lawful. By contrast, all orders which in one form or another clash with the law or military regulations can be designated as *unlawful*. Soldiers have the aforementioned duty to obey lawful orders. Within the U.S. Army, disobedience with regard to *lawful* orders is defined as a criminal offence in Articles 90 through 92 of the UCMJ. Soldiers will not be legally penalized for disobeying unlawful orders.

The military demands that soldiers risk their lives when necessary. Consequently, as indicated above, it appears that soldiers who do not follow lawful orders must be punished harshly and that the penalty for disobedience must have a deterrent effect. Accordingly, in the United States, during times of war, the maximum penalty for disobedience is capital punishment.<sup>58</sup> The articles of the UCMJ that address non-compliance with lawful orders can be summarised as follows. Article 90 (2)<sup>59</sup> prescribes punishment for wilful disobedience of a *lawful* command towards a superior commissioned officer; Article 91 (2)<sup>60</sup> includes wilful

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<sup>57</sup> In the military, the ethical standard is codified as well in the military (see Military Code of Ethics in Chapter Three). Ethics usually refers to a professional set of norms, that applies for example to lawyers or physicians. Arguably, the military is a profession, military ethics (Huntington 1967, Wolfendale 2011).

<sup>58</sup> See Appendix 12 of the MCM- Maximum Punishment Chart. In less traditional armies, such as the Bundeswehr, which refers to its soldiers as “civilians in uniforms” disobedience is, accordingly, punished less harshly, aside from the fact that capital punishment is no longer an accepted penalty in the EU.

<sup>59</sup> Article 90 UCMJ–Assaulting or wilfully disobeying a superior commissioned officer. Any person subject to this chapter who- (1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in execution of his service; or (2) wilfully disobeys a lawful command of his superior commissioned officer; shall be punished, if the offence is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offence is committed at any other times, by such punishment, other than death as a court-martial may direct. The first part of Article 90 is not relevant at this point, as the present Chapter is concerned with disobedience and not assaults.

<sup>60</sup> Article 91 UCMJ– Insubordinate conduct toward warrant officer, non-commissioned officer, or petty officer. Any warrant officer or enlisted member who- (1) strikes or assaults a warrant officer, non-commissioned officer, or petty officer, while that officer is in the execution of his office; (2) wilfully disobeys the lawful order of a warrant officer,

disobedience towards a non-commissioned officer, a warrant, or a petty officer as an offence; while Article 92<sup>61</sup> refers to the failure to obey general orders or regulations.<sup>62</sup> All three articles only allude to obedience to *lawful* orders. The difference between Articles 91(2) and 91 (2) stem from both the rank of the superior whose orders have been disobeyed and the consequences that such conduct will bring about. Article 92 references disobedience to standing orders and regulations, which is generally not as severely punished as disobeying a direct order.

Chapter IV of the 2012 United States Manual for Courts-Martial (MCM) further identifies several characteristics of the unlawfulness of the order in question. The first important element regarding lawful and unlawful orders begins with a general rule and a crucial exemption to due obedience. Based on the prescriptions outlined in the MCM, soldiers generally have to presume that orders are lawful, as stipulated in Section 14c(2)(a)(i):

Inference of lawfulness. An order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate. This inference does not apply to a *patently illegal* order, such as one that *directs the commission of a crime*.

Accordingly, a soldier must assume that orders are lawful and that he will be held accountable if he disobeys, unless the order is *patently illegal*. “Patently”, or “manifestly” illegal as it is otherwise referred to, as aforesaid, can be summarised as any order demanding an act that leads to an “obvious”, “indisputable”, “manifest”, “universally known to everyone” crime (Osiel, 1999, p. 46). Hence, if soldiers only have a duty to refuse “patently illegal” orders, then those orders that fall short of being patently illegal, yet still are “illegal” orders, thus reside in a (legal) grey area, whereby the soldier is seemingly under no obligation to disobey.

Nevertheless, for the purposes of the present discussion, Section 14 (c) (a) (i) offers a first source of unlawful orders, namely the instruction to commit a crime, which also constitutes one example of *patently illegal orders*.<sup>63</sup> For soldiers, all instructions that lead to a violation of the punitive articles (embedded in Chapter VIII of the UCMJ) should constitute *patently*

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non-commissioned officer, or petty officer; or (3) treats with contempt or is disrespectful in language or deportment toward a warrant officer, non-commissioned officer, or petty officer while that officer is in the execution of his office; shall be punished as a court-martial may direct. What is “wilful” disobedience? MCM Chapter IV, Section 14 (2) (f) explains under nature of the disobedience “Wilful disobedience”: is an intentional defiance of authority, failure to comply with an order through heedlessness, remissness, or forgetfulness is not a violation of this Article, but may violate Article 92. Disobedience will also be discussed in the subsequent Chapter.

<sup>61</sup> Article 92 UCMJ – Failure to obey an order or regulation - Any person subject to this chapter who- (1) violates or fails to obey any lawful general order or regulation; (2) having knowledge of any other lawful order issued by a member of the armed forces which it is in his duty to obey, fails to obey the order; or (3) is derelict in the performance of his duties; shall be punished as a court-martial may direct.

<sup>62</sup> These articles are similar to Articles 11 through 14 (Insubordination, in specific, Article 12, Disobedience to lawful commands.

<sup>63</sup> This explanation is comparable to Article 12 of the British Army Act of 2006: “An order must be lawful; an order to do something which would amount to a crime, for example, would not be lawful.”

*illegal orders*.<sup>64</sup> These crimes include violations of Articles 77 through 134 of the UCMJ, such as, for example, *Desertion* (Article 88), *Aiding the Enemy* (Article 104), *Rape* (Article 110), or *Murder* (Article 118). If a patently illegal order is issued, then a soldier may be held liable if he obeys, and legally he cannot be penalized for disobeying. As a result, it appears that soldiers have a duty to disobey orders if this involves committing crimes. Lack of authority constitutes the second source of unlawfulness in the MCM. According to Section 14c(2)(a)(iii), the issuing officer *de jure* must have the requisite authority to give the order:

Authority of the issuing officer. The commissioned officer issuing the order must have authority to give such an order. Authorisation may be based on law, regulation, or custom of service.

As discussed above, a peer who is not directly superior to a soldier cannot issue a lawful order. The line of command is always prescribed: there should be no doubt as to who is in charge, in the event that a superior falls in combat.<sup>65</sup> In some instances, members of the military may carry *de facto* authority and as a result issue unlawful orders to which there exists no legal duty to disobey.

The third foundation for unlawfulness can be found in the subsequent Section 14c(2)(a)(iv). The section explicates that for an order to be lawful, it must bear a relationship to military duty:

Relationship to military duty. The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs. *However, the dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order.* Disobedience of an order which has for its sole object the attainment of some private end, or which is given for the sole purpose of increasing the penalty for an offence which it is expected the accused may commit, is not punishable under this article.

If an order does not relate to the service, and especially if it interferes with a person's private rights, then a soldier's disobedience of that order is not legally punishable.<sup>66</sup> Interestingly, as

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<sup>64</sup> This approach is in accordance with the legal principle of *nullum crimen sine lege*, i.e. there is no crime without a law. For United States soldiers, the most likely source of law is the UCMJ.

<sup>65</sup> This is also incorporated in the Oath that all soldiers have to swear: "I, \_\_\_\_\_, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God." (Title 10, US Code; Act of 5 May 1960 replacing the wording first adopted in 1789, with amendment effective 5 October 1962).

<sup>66</sup> This has been confirmed by *U.S. v. Morgan* (1954). Private Morgan refused to take part in a retreat ceremony due to his religious convictions (Keizer, 1978, p. 96).

emphasised in the italicized phrase, it is stressed that soldiers' personal convictions do not justify disobedience of an otherwise lawful command. Here, the United States approach clearly diverges from the aforementioned (Western) German approach.

Fourth, according to Section 14(c)(2)(a)(v), an order is unlawful if it conflicts with the receivers' statutory or constitutional rights:

Relationship to statutory or constitutional rights. The order must not conflict with the statutory or constitutional rights of the person receiving the order.

An example of such an unlawful order would be to instruct a soldier to abstain from voting in a presidential election.<sup>67</sup> Regarding the determination of the lawfulness of orders, the MCM stipulates in Section 14c(2)(a)(ii) that:

The *lawfulness* of an order in question of law shall be determined by the *military judge*.

This specific section of the punitive articles is pertinent, because it implies that it is only in the aftermath of a soldier wilfully<sup>68</sup> disobeying an order, that a judge will determine whether the order in question was unlawful and possibly illegal. Hence, a judge's decision on the unlawfulness of an order can only be granted retrospectively. The fact that a court-martial is only deciding on this complex issue retrospectively leaves soldiers facing orders that they deem to be illegal in a challenging position: if they choose to disobey, then this entails standing up to their superior and subsequently performing all the prescribed steps, while awaiting the outcome of a court-martial procedure that will either confirm or deny the lawfulness of their disobedience. In standing up to a superior, then, a soldier must not only cross the line of insubordination, but also expect the attendant disciplinary and social consequences, such as ostracization (Osiel, 1999, p. 51).

In the event that the military judge determines the soldier's disobedience to be lawful, the United States Criminal Investigation Command must subsequently launch an investigation into the conduct of the superior officer who supposedly ordered the criminal act.<sup>69</sup> Should they discover sufficient evidence, the office of the Judge Advocate General (JAG) will then decide whether it will proceed with the case. As a consequence of these proceedings, the disobeying soldier will risk becoming a deeply unpopular figure with his comrades and his superiors in particular.<sup>70</sup>

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<sup>67</sup> However, he should not openly disclose which candidate he intends to vote for, when wearing a uniform. A case in which this element has been confirmed was *U.S. v. Musguire* (1958). A seaman refused to submit a blood alcohol test, in which his right to not self-incriminate himself would have been violated.

<sup>68</sup> The MCM explains that the nature of the disobedience has to be wilful. 14.c (2) (f) "... is an intentional defiance of authority. Failure to comply with an order through headlessness, remissness, or forgetfulness is not a violation of this Article (90) but may be a violation of Article 92." (i.e. the failure to comply with a regulation).

<sup>69</sup> See Army Regulation AR 195-2 Criminal Investigation Activities.

<sup>70</sup> Whistle-blowers are members of an organisation who report or expose illegal, unethical or otherwise wrongful conduct by their organisation. In the military, as a result of their "disloyalty", whistle-blowers are known to receive threats, such as in the example of Joe Darby, who reported the photographs of abuses of prisoners at Abu Ghraib.



To summarise, according to the Manual for Courts-Martial, four elements can make an order unlawful under U.S. military law. The lawfulness of an order can only be determined by a military judge retrospectively and can be based on: (1) the illegality of the order that leads to committing a crime, (2) the lack of authority of the superior, (3) the order's non-relation to military duty, (4) the degree to which the order contravenes the receiver's constitutional rights. For the purpose of this study it is crucial to develop a broadly acceptable and academically rigorous conceptualisation of what precisely constitutes an illegal order. In academic literature the terms unlawful and illegal orders are oftentimes used interchangeably (see e.g. Keijzer 1979, Osiel 1999, O'Sullivan 2016, Caron 2019). I, however, propose to emphasize a clear distinction between the two concepts. In this thesis, *unlawful orders* refer to all those orders that are lacking legality at either the procedural or the technical levels. Soldiers will not be punished for disobeying unlawful orders including illegal orders.

Conversely, *illegal orders* will only be used to refer to those orders which command soldiers to commit criminal acts. Illegal orders thus constitute a specific subcategory of unlawful orders for which soldiers carry criminal liability in instances of patent illegality. One other type of order that may overlap with unlawful and/or illegal orders are immoral orders that soldiers may feel they have a duty to disobey, which is the subject of the subsequent section.

### 1.2.3. Immoral orders

In this section, immoral orders are examined and contrasted with unlawful orders. While an unlawful order represents a breach with a legal instrument, an immoral (but not unlawful) order constitutes a breach with extant or generally accepted moral standards of a group, institution or society and/ or goes against an individual's set of principles. The latter can also be called a person's conscience, i.e. a person's awareness of right and wrong with regard to her or his own thoughts and actions (Oxford, 1995). Illegal orders are in most cases also immoral, as the criminalised behaviour was likely criminalised in the first place because it violates what the society perceived as acceptable behaviour.<sup>71</sup> In fact, one could argue that the law is a formalised and codified representation of the accepted norms of society, which regulates and constrains the behaviour of individuals. It does so by offering explicit rules, and planned use of sanctions which encourage compliance with the rules and designated authority officials who interpret the law and apply sanctions to violators (Vago, 2003, p. 10).

If an order is perceived as wrongful, but is not in conflict with any legal standard, then the order can thus be considered to be immoral. For example, a person may have a personal moral standard not to treat others with disrespect. Unsurprisingly, moral standards in the military

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The United States government has attempted to protect whistle-blowers with the 1989 Whistle-blower Protection Act, and the Whistleblower Protection Enhancement Act and Presidential Policy Directive 19. A further example is former U.S. police officer Kathryn Bolkovac, who blew the whistle on international crimes of human trafficking and sexual enslavement (including by UN personnel) in Bosnia (Bolkovac, 2011).

<sup>71</sup> Examples of moral, yet illegal orders might involve the killing one person in order to spare the lives of many more.

are codified and translated into behavioural prescriptions that are delineated in official documents. For example, the Code of Conduct prescribes: "I will never surrender of my own free will. If in command I will never surrender my men while they still have the means to resist." (Code of Conduct, II). In addition, military institutions like to see their members display standardised moral values. In the U.S. Army, for example, these values comprise honesty, integrity, loyalty, accountability, fairness, caring, respect, promise keeping, responsible citizenship, and pursuit of excellence (see Joint Ethical regulation 1993). Other armies, at least within Western military institutions, have established comparable values, namely, loyalty, comradeship, courage and discipline (Robinson, 2009, p. 6). These values are then internalised as part of soldiers' professional moral standards. The Code of Conduct does not necessarily contain terms such as obedience per se, but rather regulates daily military activities (in which the value of obedience is presupposed) (Verweij, 2002, p. 145).

An immoral order thus may violate an individual's personal or subjective standard, and, from the perspective of U.S. military law, this does not justify or excuse disobedience. Immoral orders can, in principle, be either lawful or unlawful. Orders which are simultaneously immoral and unlawful, or even illegal are of significant relevance for this study as they may amount to (manifestly) illegal orders which entail a legal duty to disobey. Illegal orders may infringe on soldiers' individual and professional moral standards; for example, the abuse of prisoners would breach the moral standards of some (if not most) individuals (Wolfendale, 2007). Indeed, research has shown that numerous U.S. Army deserters felt that the way the Iraq war was conducted was wrong: "I had come face to face with the indecency of our actions in Iraq, ... I did not know about the Geneva Conventions, but I knew one thing: what I had witnessed was wrong." (Key & Hill, 2007, pp. 108-109).<sup>72</sup> Similarly, in Israel, manifold soldiers have spoken out about their conflicting emotions during their service and activities, and how they felt about their own *immoral conduct* and that of their fellow soldiers.<sup>73</sup> In both these contexts, there were no specific illegal orders given to mistreat civilians. However, immoral orders can represent the first step on a *continuum of destruction*, in which a gradual decrease in morality and increase in wrongful actions and violence are not yet perceived as such by most actors involved (Staub, 1989).

In modern military institutions, ethics training forms part of officers' curriculum (Carrick et al., 2009; Robinson et al., 2008). While *Military Ethics* focuses on the decision-making of officers, scarce attention is paid to soldiers who are positioned at the receiving end of immoral situations (Liddy, 2005). In the event of a soldier receiving an immoral order, his conscience may suggest that he has a moral duty to disobey, which is in conflict with both his need to be

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<sup>72</sup> In his autobiography, Key described numerous maltreatments, beatings and incidents of rape he knew had occurred in Iraq. His experience of the war has been confirmed by many other deserters, who talked about their respective experiences in various documentaries, see for example: "Soldiers of Conscience", "Redemption" or "Breaking Ranks".

<sup>73</sup> For a complete collection of their testimonies, see their website "Breaking the Silence. Also, Grassiani conducted her doctoral research on how Israeli soldiers dealt with immorality during operations. Grassiani, E.: *Morality and Normalcy in Asymmetrical Conflict: Distancing, Denial and Moral Numbing among Israeli Conscripts in Everyday Practices of Occupation*. 2009, unpublished dissertation.

loyal to his commanders and his legal duty to obey lawful orders (Coleman, 2009). As aforesaid, U.S. soldiers are neither encouraged nor supported in using their own moral compass to determine whether or not to obey an order; rather, they are instructed to assume that the command is lawful and are only indirectly reminded to refuse to obey patently illegal orders. Of course, moral evaluations of what constitutes right and wrong extend beyond what the law prescribes. In those cases in which a (supposed) enemy is de-humanized or harassed, the soldier may (rightly so) feel uncomfortable about his conduct, but unless the order or behaviour also includes actions that have been specifically criminalised, they would solely fall under the classification of *immoral* conduct.

Illegal orders differ from immoral-lawful orders in terms of the consequences they engender; hence, a soldier may be prosecuted for executing an illegal order, but he cannot be charged with executing *merely* - and not also unlawful and/or illegal - immoral orders. Even though his conduct was lawful, he himself may nevertheless feel remorse for the deeds he perceived to be wrongful, or even be blamed for his immoral behaviour by the media or society more broadly.

As discussed above, immoral orders violate a moral standard, which could be a personal standard, a group or institutional standard, codified or not. Soldiers may bear a moral duty to disobey the order, depending on the source of the morality involved: it could be personal, refer to the group, to the institution or to society in general. Yet, in many military institutions, soldiers who disobey orders for moral reasons may be held accountable for their disobedience, as seen in the example of the United States, where moral judgment is explicitly excluded as reason for disobedience. The sources of wrongfulness and resulting legal duty to obey in the U.S. are illustrated in Figure 1.

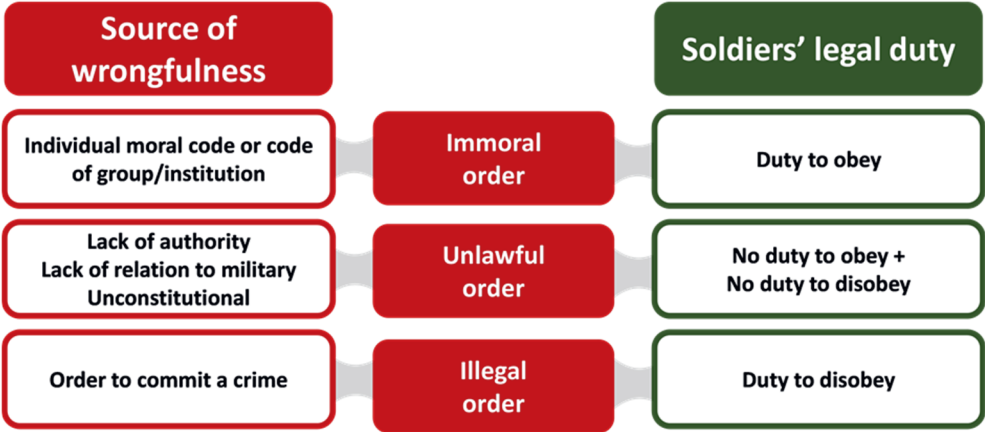


Figure 1 Wrongful orders and the soldier's legal duty to (dis)obey

The reason why this study curves into immoral orders while it is in principle concerned with illegal orders, lies in the fact that illegal orders can be made lawful under particular circumstances in which the legislators allow or instruct criminal or highly immoral behaviour. In Germany such laws are called *Unrecht*. This was the case under Hitler's administration and in other countries like South Africa during Apartheid, and to a lesser extent in East Germany during the Cold War, when numerous laws allowed or even required unfair, unjust and criminal conduct. Because these orders are lawful according to domestic law, soldiers have a (domestic) duty to obey which is in direct conflict with the (international) duty to disobey. Referring to such orders as being "wrongful" therefore allows the study of a particular subcategory of lawful-illegal orders which often violate the legal standard of the international society as they instruct- or tolerate the commission of the international crime while the orders may be lawful according to the domestic legal system. The subsequent section discusses four categories of illegal orders that are particularly relevant for soldiers, as these are orders that lead to the commission of international crimes.

### 1.3. Orders to commit international crimes

International crimes include the crime of genocide, crimes against humanity, war crimes, and the crime of aggression as per the 1998 Rome Statute.<sup>74</sup> International crimes must be distinguished from international delicts and transnational crimes, due to the fact that they rise to a higher legal status (*jus cogens*) and bring about certain obligations for all states (Bassiouni, 1997, p. 63). For international crimes, universal jurisdiction can be applied, meaning that any court in any territory can prosecute any individual for such crimes committed against any people in any territory (Randall, 1987/88).<sup>75</sup> The soldier, who may have received domestic guidance regarding his respective duty to obey or disobey, thus also has obligations at the level of international criminal law. Indeed, domestic law can be sidelined or trumped by higher or international sources of authority if the international crimes reach the norm of *ius cogens* (Bassiouni, 1997).

The conflict between manifestly illegal orders and domestic law is especially acute for soldiers when domestic law becomes illegal or *Unrecht*, which was clearly seen in the example of German Wehrmacht soldiers who had to pledge their allegiance to Hitler and Hitler's will rather than the German constitution (Minow, 2007).<sup>76</sup> The situation for Wehrmacht soldiers was complicated further by the fact that any form of disobedience was made a capital offence in Article 5, "Zersetzung der Wehrmacht" of the "Kriegssonderstrafsrechtsverordnung" (KSSRVO) on 11<sup>th</sup> August 1938.<sup>77</sup> Accordingly,

<sup>74</sup> Even though not included under the jurisdiction of the Rome statute or one of the "core" crimes, international crimes, or crimes against all human mankind, may also include: piracy, torture, and terrorism. See Jordan or Stahn (Jordan, 2000; Stahn, 2019, pp. 23-31).

<sup>75</sup> While some scholars take the legal principle of universal jurisdiction as a given, others have serious doubts pertaining to the political abuses that the application of universal jurisdictions can engender (Ikenberry, 2002).

<sup>76</sup> *Gesetz über des Staatsoberhaupt des Deutschen Reichs* [Law Concerning the Head of State of the German Reich], 1 August 1934, RGBl. I 1934 at 747 (F.R.G.)

<sup>77</sup> See: "Kriegssonderstrafsrechtsverordnung" (KSSRVO) of 11 August 1938.

Wehrmacht soldiers could choose to either perpetrate a crime of the most gruesome nature or break the chain of command and run the risk of being sentenced to death for their disobedience. Examples of disobedient Wehrmacht soldiers are discussed in Chapter Four.

One differentiation between ordinary criminal offences such as murder or rape and international crimes is that the latter (usually) contain a political element, and are perpetrated on a large-scale, or perpetrated in a specific context (Fry, 2014, p. 13). Smeulers and Grünfeld purport that international crimes are often manifestations of political violence and that they are ordinarily committed on behalf of the state (Smeulers & Grünfeld, 2011, p. 20). The armed forces are one of the primary receivers and executors of such state policies. In the following subsections, legal definitions of the four international crimes will be discussed, as well as how soldiers may recognise or *know* that they are being ordered to perpetrate international crimes and, hence, identify their corresponding duty to disobey, through recourse to hypothetical orders from an imaginary superior officer Williams to commit such crimes.

### 1.3.1. Orders to commit the crime of genocide

As discussed above, Article 33 (2) of the Rome Statute considers the crime of genocide to be manifestly illegal. While committing the crime of genocide is evidently illegal, this section examines both the deeds that come under the banner of this crime and how orders to commit genocide may be received by soldiers. The term genocide was first proposed by Lemkin in 1944 in reference to the extermination of the European Jewry, and was subsequently codified in the first United Nations Human Rights treaty, the 1948 Convention for the Prevention and Punishment of the Crime of Genocide (Schabas, 2010, p. 119; Cassese, 2002b, p. 335).<sup>78</sup> Genocide is defined in Article 2 of the 1948 Genocide Convention and the Punishment of the Crime of Genocide and Article 6 of the 1998 Rome Statute as:

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

A hypothetical example of an order to commit genocide would involve superior officer Williams ordering his subordinates to: “execute all villagers, including babies, women and elderly, *because* they belong to tribe Y, an ethnic group that we wish to *eliminate* from the face of the earth”.

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<sup>78</sup> The Convention was created as a result of UN General Assembly Resolution 96 (1).

This order can be classified as an order to commit genocide because the following elements of the crime of genocide are included within it: members of a group are killed on the basis of their ethnicity with the specific intention of destroying this ethnicity. While additional issues would require consideration in court, in reality, a soldier would be unlikely to receive such an explicit order. It is more likely that officer Williams would solely order to “kill the villagers”, with the wider policy context of exterminating tribe Y never being literally mentioned to the soldier. Indeed, an order to commit genocide is unlikely to ever be an explicit order to commit this specific crime. Whether or not actions amount to genocide is something that is typically argued and determined by legal scholars and judges *ex post facto*; consequently, one can question the extent to which a soldier should be expected to identify an order, or even a set of orders, as being tantamount to genocide directly after receiving the order. That said, according to the Article 33(2) of the Rome Statute, soldiers can never solely rely on the defence of superior orders when receiving orders to commit genocide, and, therefore, are expected to be fully cognisant of when they receive genocidal orders and their attendant duty to disobey them.<sup>79</sup>

If the soldier does indeed act upon his duty to disobey the illegal order to contribute to genocide, then what can be expected from the superiors who issue such obviously illegal orders? Would it not be fair to expect that such a superior may not remain within the realms of lawful reactions to such legitimate instances of disobedience? The soldiers’ position can therefore be paradox because, even if a clear order to commit an act of genocide has been given, soldiers who wish to refuse might fear summary execution as a consequence of their (legitimate) disobedience. Yet, if the orders are not explicitly stated, is it then fair to expect from a soldier to always know that what he has been ordered to do constitutes or contributes to the crime of genocide?

### **1.3.2. Orders to commit crimes against humanity**

The category of *crimes against humanity* is listed under Article 5 of the Rome Statute as one of the most serious crimes, and is similarly to genocide designated as *manifestly* illegal under Article 33(2). Crimes against humanity constitute a broad category of offences and are not easy to define.<sup>80</sup> Indeed, there is no comparable international convention to the 1948 Convention Against Genocide with respect to codifying crimes against humanity. Under Article 7 (1) of the Rome Statute, the following offences fall under the category of crimes against humanity:

Any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

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<sup>79</sup> See section 1.2 above for exact citation of Article 33.

<sup>80</sup> Cassese described them as follows “Crimes against humanity have an element of cruelty ... which makes them intolerable to the conscience of the international community” (Cassese, 2002a, p. 363).

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) ...

These offences or attacks<sup>81</sup> must be perpetrated on a “widespread or systematic” scale against a civilian population and be “pursuant to or in furtherance of a State or organizational policy to commit such attack”, Article 7 (2).<sup>82</sup> An example of an order to commit a crime against humanity would be if superior officer Williams ordered his subordinates to “execute all 10,000 villagers, including babies, women and elderly, as we have been doing regularly”. The major difference between the obviously overlapping actions of the commission of the crime of genocide and crimes against humanity is that in the former case a court has to establish the existence of the *dolus specialis*, that is, the intent to destroy in whole or in part the targeted group, while the latter includes targeting any kind of civilians, including political and social groups for any kind of reasons, and is thus broader in scope (Cassese, 2002a, p. 339; Schabas, 2010, p. 135).

For crimes against humanity to be perpetrated, the context of the actions must be taken into account, in order to establish that the necessary threshold has been met for any of the offences listed above to constitute actual crimes against humanity, rather than simply being sporadic or isolated criminal incidents (Cassese, 2002a, p. 361).<sup>83</sup> Individual atrocities that have been perpetrated with political intent, such as targeting a large number of civilians in a singular event, can cause by themselves massive destruction, and may thus also be regarded as the exception to the rule (Schabas, 2010, p. 148). It remains open to discussion at what point an atrocity qualifies for the legal definition of crimes against humanity. If the legal definition in itself is not obvious, then it is reasonable to question the extent to which the average soldier can be expected to be able to identify this specific crime. As will be discussed in the next

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<sup>81</sup> “Attack” is defined as “a course of conduct involving the commission of acts of violence” (Schabas, 2010, p. 153)(referring to the ICTY judgment Naletilić) If the crimes are part of a military attack, then they constitute war crimes.

<sup>82</sup> However, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) held in the *Tadić* Judgment that: “although it is correct that isolated, random acts should not be included in the definition of crimes against humanity, that is the purpose of requiring that the acts be directed against a civilian *population*, and thus, even an isolated act can constitute a crime against humanity, if it is the product of a political system based on terror or persecution” (Cassese, 2002b, p. 367). The trial chamber also qualified crimes against humanity as a more serious offence than war crimes in the *Tadić*, which was implicitly confirmed in the *Erdemović* cases, because the crime harm is done to all human beings (ibid). That said, these are part of the ICTY jurisprudence, which I consult due to the lack of case law in the ICC. The ICTY Statute does not include the necessity to involve the state.

<sup>83</sup> For example, the State must either be involved in the planning or must encourage the perpetrations. Given the widespread or systematic context in which such crimes are committed, an order that requires the soldier to perpetrate acts, which constitute or contribute to crimes against humanity would seemingly have to be inspired by a more or less coherent policy, rather than relating to a bunch of only loosely connected individual incidents.

section the soldier's dilemma can become even more complicated when he is ordered to commit war crimes.

### 1.3.3. Orders to commit war crimes

In times of war, the conduct of hostilities is restricted and should be guided by *jus in bello*, most notably the 1949 Geneva Conventions, as well as their 1977 and 2005 Additional Protocols. These legal instruments aim to humanise war.<sup>84</sup> At first glance, *humane warfare* may come across as an oxymoron. However, certain limits on the use of lethal force and violence have been agreed upon, which ultimately serve to restrict the use of means that are considered to be wrong in and of itself (*male in se*), such as the use of toxins and cluster bombs, in order to prevent unnecessary suffering especially among the civil population.

The conventions delineate both who should be protected during war and how armies should limit their use of force. In this regard, they are also referred to as *ius in bello*, International Humanitarian Law/IHL, Operational Law or Law of Armed Conflict/LoAC. The Geneva Conventions were not intended to form the basis for prosecuting individuals for violating the rules laid out in the Conventions, but rather sought to create obligations for states to prosecute individuals under domestic law (Bothe, 2002, p. 392).<sup>85</sup> The Rome Statute, which according to Article 8 (1) *shall have jurisdiction in respect of war crimes when committed as part of a plan or policy or as part of a large-scale commission of such crimes*, lists war crimes as the longest catalogue of offences in Article 8 (2) as follows:<sup>86</sup>

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<sup>84</sup> For example: The four 1949 Conventions deal with the protection of wounded and sick soldiers on land during war (First Geneva Convention), wounded, sick and shipwrecked military personnel at sea during war (Second Geneva Convention), Prisoners of War (Third Geneva Convention) and the protection to civilians, including in occupied territory (Fourth Geneva Convention). The 1977 Additional Protocols increase the protection for victims of international and non-international conflict. The 2005 Additional Protocol relates to the "Adoption of an Additional Distinctive Emblem" and is therefore less relevant at this present point. The Geneva Conventions also emphasizes the responsibility of states to enact legislation necessary to provide effective legal penalties for individuals who perpetrated or ordered grave breaches of the Conventions. This can be regarded as a baseline for universal jurisdiction for grave breaches of the Conventions.

<sup>85</sup> See, for example, Article 47 of the First Geneva Convention: "The High Contracting Parties undertake, in time of peace as om time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and in particular, to include the study thereof in their programmes of military" and, if necessary, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains." (also see Article 48 of the Second Geneva Convention; Article 127 of the Third Geneva Convention and Article 144 of the Fourth Geneva Convention.

<sup>86</sup> "War crimes", however, were not defined as such by the Geneva Conventions (GC). One can only find an explanation of "grave breaches" of the Conventions: "those involving the following acts, if committed against persons, or property protected by the Convention: wilful killing, torture or inhumane treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly." (See Article 50 of Geneva Convention I (GC I), Article 51 (GC II), Article 130 (GC III) and Article 147 (GC IV).) As noted in the Preliminary Remarks of the Conventions, the "texts will doubtless be an important contribution to towards defining "war crimes" in International Law" (p.6). Accordingly, the GCs definition of grave breaches was incorporated into the Rome Statute.



Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

Wilful killing;

Torture or inhuman treatment, ...

Wilfully causing great suffering, or serious injury to body or health....<sup>87</sup>

The Rome Statute is primarily concerned with armed conflicts of an international character, and armed conflicts not of an international character, but does not apply to situations of internal disturbances, tensions such as riots and isolated or sporadic acts of violence.<sup>88</sup>

A hypothetical illegal order from officer Williams to commit a war crime may be: “Kill these villagers!” Such an order must be viewed in context before it can be classified as a grave breach of the Geneva Convention. From a soldier’s perspective, orders to commit war crimes may be the most difficult to identify as such, as the acts ordered may overlap with the earlier mentioned hypothetical orders to commit genocide and crimes against humanity. Yet, on paper, orders to commit war crimes are considered to be less obviously illegal, in the sense that war crimes do not necessarily fall under the category of *manifestly illegal* orders, as they are not literally included under article 33(2). While soldiers who receive orders to commit war crimes are not exempted from bearing individual criminal responsibility, the context is critically important for determining whether soldiers should have known their orders were illegal. And while the knowledge of the illegality of the order is a crucial element in the duty to disobey, it might be questionable whether soldiers are actually cognisant of legal definitions of these crimes. One may also question to what extent soldiers are aware of the broader context in which orders are given.

International criminal-legal accountability is most likely to be invoked if war crimes are carried out as part of a larger plan or concerted policy initiative. Article 8(1) states: “The court shall have jurisdiction in respect of war crimes *in particular when committed as plan or policy* or as part of a large-scale commission of such crimes”. The phrase *in particular* does not exclude prosecuting incidental or non-sporadic war crimes, but, more concretely, offers guidance as to which crimes should be tried at the ICC (Schabas, 2010, p. 201).

For ordinary offences, such as murder, rape or robbery to constitute war crimes, a nexus between the wrongdoing and the armed conflict must be established for the crime to be considered as a *war crime*. It is not sufficient that a crime takes place during an armed conflict; rather, it must also be associated with other hostilities (Schabas, 2010, p. 207).<sup>89</sup>

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<sup>87</sup> (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; (vii) Unlawful deportation or transfer or unlawful confinement; (viii) Taking of hostages.

<sup>88</sup> See Article 8 (2) (c), (d), (e) and (f) of the Rome Statute.

<sup>89</sup> Article 8 (2) (b) also includes other humanitarian legal principles as sources for war crimes in international conflicts. Article 8 (c) further enlists a myriad of offences as serious violations of common Article 3 of the Geneva

If violations of the Geneva Conventions or offences listed under the Rome Statute are committed as single, sporadic events, then they generally will not be prosecuted under international criminal law. Instead, these will normally have to be dealt with by domestic courts.<sup>90</sup> Interestingly, United States criminal prosecutors only prosecute foreign (enemy) nationals for war crimes; violations of the *Law of Armed Conflict* by U.S. personnel will be subject to Military Justice and prosecuted under the UCMJ (Principles 3-154, Soldiers Guide, FM -21-13).

To add even more complexity, decision-makers in the military are expected to keep in mind four core principles of the Law of Armed Conflict.<sup>91</sup> The principle of *military necessity* prescribes that actions indispensable for military success must be considered in conjunction with other principles, such as, for example, the general prohibition against targeting civilians, or persons *hors de combat*. Even though civilians and certain buildings are generally protected, in dire circumstances amounting to military necessity they may not be spared, whereby they are classified as *collateral damage*. Civilians can never be a legitimate military target. Applying this principle to our hypothetical example shows some additional levels of complexity: for example, if officer Williams' order to kill the villagers was given because the villagers were in fact believed to be armed enemy combatants without a military uniform, and that his order may have been given out of military necessity. In such an event, any soldier who refuses to take part in the execution of the order may cause the mission to fail, in particular should he encourage others to refuse to obey as well.

The second military principle intends to minimize *unnecessary suffering*. Accordingly, decision-makers should select appropriate weapons and machinery, to avoid inflicting more suffering than is absolutely necessary. Whilst the use of lethal force is to some extent accepted as *necessary suffering*, some weapons and ammunition undoubtedly cause greater suffering or injury than others. This principle was primarily established to prevent the use of certain chemical or biological weapons; for example, the use of cluster munitions or chemical weapons is now banned as it causes much greater harm than other, equally effective

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Conventions, and is applicable to offences committed in non-international conflicts (thereby protecting persons who no longer take part in hostilities). Article 8 (e) prohibits further violations of laws and customs applicable in non-international armed conflicts.

<sup>90</sup> At the same time, since the Geneva Conventions have been ratified by 194 states, they can be universally applicable. The ICL also adopted a Draft Code of Crimes against the Peace and Security of Mankind in 1996, in which they included war crimes as crimes requiring individual criminal responsibility in Article 2 and repeated in Article 8 that the broadest possible jurisdiction of (war) crimes should be enabled by all states (Shaw, 2005, p. 597).

<sup>91</sup> The 1977 Protocol I Additional to the Geneva Conventions of 1949 includes basic rules: Article 35 prohibits the use of weapons that cause superfluous injury or unnecessary suffering; Article 48 prescribes that a distinction between civilian and combatants as well as it prohibits the attacking of civilian objects. Article 57 prescribes that caution should be taken to reduce collateral damage. Article 85 stipulates that violations of the principles constitute breaches of the principles shall be regarded as grave breaches of the Protocol. States are obligated to ensure dissemination and observation of the Protocol (Article 85). The principles can also be found in the "Soldier's Guide", for example, under (3-151).

ammunition.<sup>92</sup> To offer an illustration of this point, if officer Williams would have ordered to attack enemy combatants by using mustard gas instead of guns, the order would not be in accordance with the principle of avoiding unnecessary suffering, in which case the soldiers should have known that the order constitutes a war crime and is illegal.

The principle of *distinction* or *discrimination* is the third principle that must be taken into consideration. It prescribes that military targets need to be distinguished from non-military targets, that is, combatants must be differentiated from non-combatants. Military objects may be legally targeted, as opposed to cultural and humanitarian property, which in principle may not be attacked. The International Committee of the Red Cross' (ICRC) study on customary international law begins with: "*Rule 1*. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians" (Henckaerts & Doswald-Beck, 2005).

This principle is closely related to the first aforesaid principle (*military necessity*), but while the first principle emphasizes that a measurable military advantage must result from the operation, this principle prescribes that certain persons and certain property must be protected in the process. However, at times, especially in those situations where enemy combatants are not wearing uniforms or overtly bearing arms, this distinction can be difficult to make. The distinction is complicated further if the target has a dual-purpose use by the military and civilians. For soldiers, it may not be immediately obvious whether the villagers they are ordered to kill constitute combatants or not. Rather, it depends on the circumstances. For instance, if the soldiers in our hypothetical example were aware of the fact that officer Williams felt deep animosity towards the locals and had earlier received confirmation that the village only contained innocent, unarmed civilians, then the situation would leave little incentive for doubting the illegality of the order to kill them all.

The fourth principle, that of *proportionality*, refers to the excessiveness of damage and harm caused by attacks on civilians, or damage caused to property relative to the military advantage achieved through a certain action. Consequently, it requires commanders to weigh up the potential collateral damage against the military gains from following a course of action. For example, if there was only one combatant hiding among 500 villagers in the village that soldiers are ordered to attack, then one could argue that the harm potentially caused by such an attack may be excessive. However, if the single combatant in the village is the leader of a nationwide insurgency group, one may argue that this military objective could potentially justify, the unintended collateral killing of some unarmed villagers.

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<sup>92</sup> See: The Convention on Cluster Munitions was adopted on May 30, 2008 entered into force on 1 August 2010. The treaty prohibits the use, transfer, and stockpiling of cluster bombs, a type of explosives which disbands submunitions ("bomblets") which have an indiscriminate target. And: The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction, which entered into force on 29 April 1997.

These four core principles of the Law of Armed Conflict interact. Military decision-makers are expected to respect all four principles. Failure to do so may lead to wrongdoings being assessed retrospectively in a court of law. In the court room, with the benefit of hindsight, it will be determined whether the military actions were justified on the grounds of military necessity, or whether the aforesaid principles have been violated to the extent that they constitute breaches of the Geneva Conventions. Yet, the situation for the enlisted soldier is more complex: without the benefit of hindsight, in the event that the soldier identifies Williams' order as illegal, he would have the duty to disobey. However, if the circumstances apparently leave no alternative option other than to follow the order and kill villagers, such as if those villagers are indeed believed to be enemy combatants, then possibly, depending on the circumstances of the case, these actions would not be tantamount to a breach of the Geneva Conventions.<sup>93</sup> As discussed above, enlisted soldiers are not decision-makers and therefore not expected to weigh up military principles against one another to determine whether they received an order to commit a war crime, and therefore they can only bear individual criminal liability if they knew or could have known that the orders were illegal. In a similar vein to the domestic approach, the international approach also exonerates obedience to illegal orders that fall short of being manifestly illegal.

Whilst many offences that qualify as a war crime overlap with those listed under genocide and crimes against humanity, other offences may be accepted as *collateral damage* or be justified in terms of military necessity. In all situations in which war crimes are part of a policy or condoned by (state) authorities, disobedience to superior orders may not guarantee that the disobeying soldier will actually be supported in his decision; after all, he has to rely on the very authorities who approved or condoned the crime to support him in his personal determination of illegality. Yet, if the soldier's superior's state condones the order to commit a war crime, can it be expected from this state to treat the soldier's disobedience in a way that incentivises him to act on his duty to disobey? Not only *Unrecht* regimes such as Nazi Germany where numerous Nazi officers were not open-minded when it came to disobedience, as at least 33,000 of their own soldiers were executed for disobedience (Haase & Paul, 1997), but also democratic regimes have been reluctant to consider the prosecution of own nationals for war crimes committed, as can be illustrated by the U.S. authorities' response regarding war crimes committed in Vietnam, or the Dutch authorities' responses following the war crimes committed in Indonesia (Pluver 1972, Luttikhuis & Moses 2012).

#### 1.3.4. Orders to commit the crime of aggression

Carl von Clausewitz coined the phrase that war is *politics by other means* (Neff, 2005, p. 162). However, other seminal international legal thinkers and philosophers, including Saint

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<sup>93</sup> At the time of their perpetration, officers often receive praise for their successes when giving orders to perpetrate war crimes. An example is the case of a high-ranking Soviet officer, Kononov, who was decorated for his successes as a partisan leader during WW-II in Latvia by Soviet officials, but was later found guilty of war crimes. See ECHR Case of Kononov v. Latvia (Application no. 36376/04).

Thomas Aquinas, Francisco de Vitoria or Hugo Grotius had already pointed out that the use of lethal force against other peoples needs to be justified (DiMeglio, 2005). There are circumstances that can justify an intervention, and make aggression, or the use of force, a *just action*. Current law on the legitimate beginnings of a war, or *ius ad bellum*, is based on the Charter of the United Nations. The United Nations Security Council only approves of war as “the use of force by all means” in two scenarios. Firstly, after a state has been attacked, it has the right to self-defence (Article 51 of the United Nations Charter). Secondly, if the “international peace or security” in a certain area is threatened, then the United Nations Security Council may vote to utilize all means necessary (including military force) to secure the area (Article 42, after all other non-violent means have been exhausted, Article 39 and 40). In general, whether an intervention or attack is deemed lawful requires the support of the United Nations Security Council (under Article 42), meaning that the five permanent veto powers either approve of the intervention or are at least acquiescent. If a state uses military force abroad without having been attacked, and, as such, is not relying on the argument of self-defence, and if the intervention has not been sanctioned by the UN Security Council, then one could argue that the aggression is ultimately unjust or even illegal.<sup>94</sup>

Defining the *crime of aggression* proved to be more difficult than agreeing on other international crimes (de Hoon, 2015; Kreß & von Holtzendorff, 2010).<sup>95</sup> This core crime has been included under Article 5 of the Rome Statute, and now (20 years later) (temporarily) been codified as Article 8 *bis*:

For the purpose of this Statute, “crime of aggression”, means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

The use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations...

The invasion or attack by armed forces of a State of the territory of another State...

An example of a possibly illegal order to contribute to committing the crime of aggression would thus come from the commander in chief, and could be: “Use all available capacity of military force to invade (or attack) the peaceful and politically stable state x”. For different reasons, soldiers do not have a duty to disobey orders based on the fact that the war/conflict in question is unlawful. Firstly, as opposed to the hypothetical order above, military invasion

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<sup>94</sup> At the same time, one could argue that since only the five permanent member States of the UN Security Council have to refrain from using their veto power, the label “just war” is a politically charged one.

<sup>95</sup> The above definition was formed in June 2010, Kampala and represents the culmination of a long journey by legal experts to finally define the crime of aggression. This amendment to the Rome Statute is subject to ratification by a majority of States, which is to occur after January 1<sup>st</sup>, 2017. Based on whether states will ratify the amendment, the court may or may not exercise jurisdiction.

in another country is not necessarily a criminal act in and of itself. The use of military force can, for example, be based on humanitarian concerns and may – as referred to above - have been approved by the UN Security Council. According to the UN Charter, the Security Council has to decide that such a threat exists and will decide which measures will be taken (for example sanctions) before it will decide to resort to military measures. In case a member state has been attacked, states can rely on their right to self-defence (Article 51) in order to maintain or secure international peace and security.

Dinstein proposed referring to *ius contra bellum*, replacing the *ius ad bellum* principles (Dinstein, 2005, p. 83). In a scenario in which a state has not been attacked and failed to secure the approval of the intervention by the Security Council, then members of the armed forces may feel that, despite the fact that they are not involved in political decision-making, if the state's leader(s) unjustly decides to invade a country, a crime of aggression has been ordered.<sup>96</sup>

As Bothe notes: one should view aggression as a crime “triable only before an international court”, citing Mr. Crawford at the ICL’s 2360<sup>th</sup> meeting (YILC, 1994. Vol. 1, 221) and at this point, this crime is not applicable for a soldier who is on the receiving end. Article 25 3bis stipulates: “In respect to the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military actions of a State” (Bothe, 2002). The Rome Statute clearly states that the person ordering the crime of aggression must be effectively exercising control over the military action, which is to say that it clearly refers to decision-makers as opposed to soldiers who receive the order to carry out the war. Resultantly, the soldier is not liable for the crime of aggression and has no legal obligation to disobey the order to carry out an illegal war.

The lawfulness of *aggression* is not even supposed to be determined by military leaders, as the military institution is ostensibly a non-political apparatus. Some senior military personnel disagree and believe it is their (moral) duty to retire in such cases (Cook, 2008). Furthermore, Gaja noted that “States rarely advocate criminal repression of individuals who cause other States to make that infringement. Political considerations generally get in the way of repression” (Gaja, 2002, p. 427). Therefore, it remains unclear whether military personnel will ever be held responsible for the (unjust) use of military force. Despite the fact that the crime of aggression has been included as a core international crime, the order to deploy a soldier to a war perceived as being unjust constitutes only an immoral order (Montrose, 2014). Similarly, Israeli soldiers who on moral grounds refused to deploy to active duty in the war zone during the first Lebanon War and the First Intifada were charged with disciplinary offences and sentenced to between 14-35 days of imprisonment (Linn, 1996; Linn, 2002). Dannenbaum offers a summarising assessment of the soldier's perspective: “Aggressive war entails broad and devastating violence. It is banned peremptorily and criminalised in international law. Its prohibition is in some ways the core premise of the

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<sup>96</sup> Elements of the Crime explain: “The perpetrator planned, prepared, initiated or executed an act of aggression”.

contemporary international order. And yet, those who participate most intimately in the criminal action and those most directly impacted by it appear to be marginalized almost entirely from the international legal framework surrounding the crime of aggression” (Dannenbaum, 2018). Orders to commit international crimes and the corresponding legal duty to obey are illustrated in Figure 2.

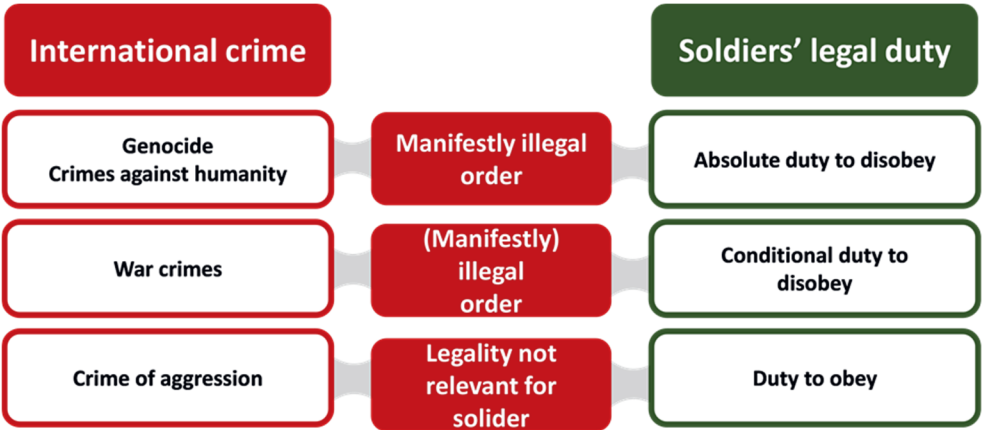


Figure 2 International crimes and the soldiers' legal duty to (dis)obey

### Conclusion

When a soldier receives an order to carry out a criminal act, he finds himself in a moral and legal quandary. He must choose to either obey his superior’s order by perpetrating the crime or disobey the order by refusing to commit the offence and, in turn, breaking the chain of command. The present chapter explored the concepts of illegal orders and the duty to disobey by adopting a two-pronged approach to understanding which orders fall under the term “illegal orders”, from the perspective of both domestic and international law. It is conveyed to soldiers in the UCMJ that orders are either lawful and must be obeyed or are unlawful and do not have to be obeyed. However, it is only in the case of orders that direct the commission of a crime, i.e. *illegal orders*, that soldiers bear conditional liability and a conditional duty to disobey. In cases where soldiers are unable to rely on the defence of superior orders, they have a duty to disobey. However, closer examination of domestic military law and guidelines suggests that, while the duty to disobey exists on paper, it may not be desirable in practice as the duty is neither expressed in primary legal documents nor likely to be supported by superiors on the spot. Soldiers in military institutions comparable to the United States are not encouraged to rely on their moral judgment; rather, they must assume the lawfulness of orders and will only be excused for their disobedience if the order is determined retrospectively by military courts to indeed have been unlawful.

By examining four international crimes, and through recourse to hypothetical examples of illegal orders to commit such crimes, this chapter has identified that different criminal liability is applied, and that different duties to disobey exist for orders to commit international crimes. For the crime of aggression, the soldier bears no individual criminal responsibility and no legal duty to disobey. For the crime of genocide and for crimes against humanity, soldiers can never rely on the defence of superior orders and, as such, always have a duty to disobey. Soldiers bear a conditional duty to disobey orders to commit war crimes. Military principles must be taken into account when determining the occurrence of a war crime. The soldier's predicament is exacerbated by the immense pressure to decide *in situ* whether the order he was given was illegal and whether he has to act upon his duty to disobey. As U.S. judge Deady and prosecutor Jackson expressed already, soldiers' liability and duty to disobey an illegal order must be understood in the context of the illegal order itself.

While the process of commencing a legal investigation at the domestic level is difficult on the soldier's part, it is even harder at the international level. Even if the soldier is theoretically aware of his duty to disobey in certain situations, being able to correctly execute this duty appears to be implausible in most cases. Offences overlap and contextual elements play a key role in the determination of the crime. The individual soldier is judged retrospectively with the benefit of time, hindsight and the full breadth of information underpinning the orders, which may not have been as clear at the time to the soldier, as it is to the judge in retrospect.

The overall message conveyed to the soldier confirms that soldiers (in the United States) are not expected to question the lawfulness of orders. It appears that manifestly illegal orders are ostensibly to be disobeyed. However, one may ask: are those orders not precisely the hardest ones to disobey in practise? International crimes are in many cases either ordered by the authorities or are condoned by them. If authorities condone or order the commission of international crimes, then how can a soldier expect a lawful response to his refusal? The very crimes that require an absolute duty to disobey may thus be the most difficult ones to refuse in reality: "excuse me commander, but this order is illegal because it directs me to perpetrate the crime of genocide. I respectfully refuse to carry out a genocide and am prepared to face a court-martial."

The soldier's duty to disobey illegal orders suggests a theory-practice dichotomy. This gap is also reflected in the conflicting demands placed on the soldier: on the one hand, he has to obey orders with little consideration; on the other hand, he will be held liable for the most extreme crimes. For everything in between, the message conveyed to the soldier supports due obedience over the duty to disobey, unless he knows he is committing a crime. While this conditional duty to disobey is a robust concept in theory, it has very little practical applicability due to the nature of the soldier's dilemma. This theory-practice dichotomy will be examined further in due course within the present study. It appears that in almost all cases in which a soldier bears a duty to disobey, he is – on the short term, in practice - better off obeying the order and hoping that it never results in domestic or international court proceedings. However, there are soldiers in history who have broken with the chain of



command and refused to go along with what their comrades did. In order to better understand these exceptional actions, the subsequent chapter will examine what is known about disobedience and nonconform behaviour within social psychology.

# **CHAPTER TWO**

## **Social Psychological Dimensions of Nonconformity and Disobedience**

## Introduction

As an American of Jewish origin, Milgram was intrigued by the apparent ease with which German people obeyed the Nazi authorities in discriminating against the Jews, which culminated in the Final Solution of the Holocaust (Zimbardo, 2009, p. xiii). He set out to design an experiment which would measure the responsiveness of people to receiving unjust demands from an authority figure. Milgram was explicit in his intention to understand why Germans, such as Adolf Eichmann, defended their involvement in genocide on the grounds that they were only obeying orders. In his studies, Milgram operationalized scenarios in which individuals were instructed to obey destructive demands by an authority figure and measured how the environment impacted on their rate of obedience. Obedience to unjust demands has continued to interest researchers in the field ever since, even though replications of his seminal studies are limited due to ethical considerations (Miller, Collins, & Brief, 1995, p. 11; Reicher, Haslam, & Miller, 2014).<sup>97</sup>

Milgram's research was inspired by an influential study on social influence, conducted by Asch, who tested people's tendency to adjust their judgment about the matching length of a line to a patently wrong answer if and when a surrounding group first claimed that the wrongful line constituted a match (Asch, 1956). Asch's studies also inspired researchers to explore conformity in numerous other situations (Allen, 1965, p. 133).<sup>98</sup>

Social influence can be understood as external (overt as well as subtle) impact on behaviour or on attitudes of individuals, and encompasses various elements that induce people to alter or adjust their behaviour or beliefs (Cialdini & Goldstein, 2004). Both Asch's Studies of Independence and Conformity and Milgram's Obedience to Authority not only underscored the importance of social influence in social psychology,<sup>99</sup> but rather have been used as explanatory frameworks for real life situations, such as participation in the Holocaust, war crimes and civilian crimes of obedience (see, for example Blass (Blass, 1999, 2009), Miller (1986, 1995), Browning (Browning, 1992), Kelman and Hamilton (1989), (Kelman, 1973; Kelman & Hamilton, 1989), or Zimbardo (Zimbardo, 2008), (Kelman & Hamilton, 1989; Smeulers, 2008, 2011)).<sup>100</sup>

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<sup>97</sup> Even though virtual reality seems to be a promising tool that allows researchers to explore the "harming others" concept further (Reicher et al., 2014). Most subjects of the Milgram experiment not only reported feeling stress, but also displayed signs of stress and discomfort, such as wiggling on their chairs, sweating and nervous laughter (Milgram, 1974, pp. 157-158).

<sup>98</sup> A third often cited study constitutes Zimbardo's "Stanford Prison Experiment" in which college students assumed the roles of guards and inmates while Zimbardo observed how easily students used authoritative and aggressive means in their role play (Haney, Banks, & Zimbardo, 1973). Zimbardo has been criticised because he incited aggressive behaviour among the guards (Haslam & Reicher, 2012).

<sup>99</sup> When examining the impact and external validity of the Milgram paradigm, Miller (1995) concludes that the Milgram paradigm is referred to in most psychology textbooks and has ecological validity for explaining destructive obedience (Miller, 1995). By contrast, he warned that the extent to which one can generalize the findings to real-life examples needs to be studied in greater detail (Miller 1995, p. 40).

<sup>100</sup> While the internal validity of Milgram's studies have been questioned by Orne and Holland (1968), overwhelmingly, scholars agree with Milgram's rebuttal (1974). Personality psychologists focus more on the

This chapter introduces the socio-psychological perspective on disobedience and nonconformity to crystallize those factors which may be of critical relevance for understanding those soldiers who (want to) refuse to follow illegal orders. External and internal factors, or so called moderators, are examined to shed light on people's behaviour when faced with dilemmas.<sup>101</sup> Research suggests that the environment is crucial in all situations, because it exerts social influence upon the individual. This is a particularly expedient concept given that soldiers are invariably surrounded by their comrades, whose presence and behaviour, depending on the situational context, are likely to have a significant influence on how they themselves act.

Social psychology has predominantly studied external social influence in experiments, internal or personal factors constitute a smaller focal point (Blass, 1991). With this in mind, the inseparable psychological issues centred on those internal factors that impact behaviour will be considered as far as is possible. These issues include personality traits, a person's cognitions and self-image, individual personal experiences, as well as the use of defence mechanisms, that is, cognitive and unconscious processes, which allow individuals to justify or accept their wrongful behaviour (Cooper, 2001).

Currently, interactionism constitutes a widely accepted approach within social psychology (Blass, 1991, p. 406). Interactionists argue that a person's behaviour constitutes a product from an interplay between the individual characteristics (for example, the person's disposition, cognitive abilities, or experience) and the external factors (for example other people, the situation they find themselves in).<sup>102</sup> Consequently, it is difficult to identify definitive moderators that can be said to predict either obedient or disobedient behaviour. Nevertheless, dispositional characteristics and situational factors can both help explain disobedience and nonconformity, even if it is hitherto unknown how exactly the two interact. Indeed, experiments very often only measure (visible or reported) changes, rather than establishing causal relations.

While the laboratory can never fully simulate and capture real-world dynamics, certain elements can be tested in order to help us understand phenomena that also occur in reality. For example, the consequences of someone's actions are infinitely greater in real-life than they are in experiments. This is because people not only have to live with their actions, but if they disobey or refuse an order, there will be profound consequences for their careers as well as for their families (which is not the case in the laboratory). Real-world obedience can harm and even kill victims. Furthermore, as Darley posited, in real-life an individual may move on from being a cog in the machine to applying pressure to others (Darley, 1995, p.

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cognitions and interpretation of events than on dispositional factors to explain subjects' behaviour, see, for example, Collins and Brief (1995).

<sup>101</sup> Socio-psychological theories and experiments concern people in general; therefore, the chapter uses generalized statements like "people tend to", although the author acknowledges that there are always those people who "tend to not".

<sup>102</sup> This inter-play can also impact the situation, for example through pre-(self) selection (who joins experiments, who joins the Nazi party or who signs up for the military (Haslam & Reicher, 2007, p. 619).

134). While experiments may last around an hour, the crimes committed by the Nazis unfolded over the course of a decade, which allowed for a gradual transition to different moral values (Milgram, 1963, p. 175). Yet, not only Milgram ultimately concluded that common psychological processes were at work, which can be recognized in the study of perpetrators of international and war crimes (Milgram, 1974; Reicher et al., 2014).

The chapter begins in section 2.1 by offering definitions of the key socio-psychological concepts used in the study. Next, section 2.2 introduces findings from experiments on conformity and nonconformity. Often, people adjust their behaviour to what they believe their immediate environment requires of them, and they conform to what others are doing. Conformity is discussed as a paradigmatic mode of social influence that can trigger people to alter their behaviour. Extant knowledge on the factors that increase conformity or nonconformity will then be examined, before proceeding to extract relevant factors that potentially account for nonconformity in soldiers (Asch, 1956; Deutsch & Garard, 1955). In particular, psychological processes that create motivations impacting nonconformity and external variables that can influence the intensity and duration of conformity can help better understanding social forces that soldiers are exposed to. Furthermore, factors that have been used to explain nonconformity or independence may also explain nonconformity among soldiers.

Along the lines of the previous section, section 2.3 discusses results from experiments on obedience to authority. Soldiers, by nature of their profession, find themselves in a hierarchical relationship and are, as discussed in Chapter One, legally bound to obey orders. Extracting findings from obedience experiments, such as Milgram's classic experiments can further help explain factors contributing to disobedience in soldiers. In addition to external or situational factors that have influenced levels of obedience in experiments, the section also introduces psychological explanations for disobedience focussing on possible internal factors impacting disobedient behaviour. Finally, the chapter concludes with suggesting moderators to include in the theoretical framework for studying conscientious disobedience of soldiers. The subsequent section offers definitions of terms used in the study.

## **2.1. Terminology**

Before crucial socio-psychological experiments are discussed, this multi-disciplinary research offers definitions and explanations for the relevant key terms used. As this research investigates the behaviour of soldiers, a fundamental theory that helps explaining people's behaviour, is self-identity theory. Self-identity theory, briefly presented in section 2.2.1, not only accounts for reasons why people choose certain courses of action but also explains the behaviour of people in groups. Subsequently, section 2.2.2 defines the terms conformity and nonconformity while section 2.2.3 defines what is to be understood as obedience. Finally, a discussion of what can be understood as authority in section 2.2.4 ends the definition section.

### 2.1.1. Self-identity theory

As part of this study investigates why soldier's disobey illegal orders, an individual's point of view, namely, the soldier's, has to be taken into account. At the core of each person lies their self-identity.<sup>103</sup> Self-identity is the mental or cognitive representation that a person has of himself. This image is based on personality traits and the idiosyncratic relationships that an individual maintains in their life. Someone who perceives him or herself to be a moral person would thus seek to behave in a manner befitting of how they think a moral person ought to behave. At the same time, a person's self-image or identity can be multi-faceted and change over time.

Hence, a self-image is not static but instead interacts with the environment, potentially reinforcing or minimizing certain aspects of a person's repertoire of thoughts or behavioural patterns. For example, people are generally consistent in their behaviour; once they classified themselves as punctual, late, funny, understanding, calm, and so on, they generally tend to behave in line with their self-image. According to self-identity theory, self-identity guides a person's behaviour and attitudes, as well as their decision-making (Stets & Burke, 2000, p. 224). These examples all illustrate observable behaviour. Yet, changes in behaviour and traits do occur as well.<sup>104</sup> One could compare a person's need for consistency regarding one's self-identity with paradigm changes in science: during periods when one particular set of thoughts and behaviours is accepted as *doxa*, the person will maintain and attempt to act within the frame of their self-identity paradigm; however, once this is falsified, it is subsequently replaced with a new paradigm.

A person has multiple social identities (Swann & Bosson, 2020, p. 611). For example, a soldier may have a certain self-image about who he is as a husband (a loving and supporting individual), which is different from his identity as a comrade (e.g. reliable, masculine, fearless), and altogether different again from who he is around his parents (e.g. respectful, helpful). Depending on their relation to the people in the surrounding environment in which the interaction takes place, individuals can adjust their behaviour accordingly. As a result, cognitions about the self and the environment shape our behaviour and are unique to each person.

Self-identity is closely associated with group-identity. Individuals can derive an additional social identity by virtue of their membership of a given group (Swann & Bosson, 2020, p. 615). The aspired similarity with the group incentivizes both adjustments in one's personal beliefs and joining the group in the first place. Group categorization often leads to feelings of self-enhancement with the respective group (Aronson, 2004; Cialdini & Goldstein, 2004).

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<sup>103</sup> In the 1950's, personality psychologists focussed on more static personality traits (Adorno) an approach that was generally replaced in the 1970'ss with a focus on cognitive and behavioural habits of individuals (Burley & McGuinness, 1977).

<sup>104</sup> It has been argued that frequent behaviour creates habits and habits tend to be more associated with traits (Graybiel, 2008).

In group-based identification, the traits that one ascribes to oneself based on group membership *override* the traits associated with their individual identity, which can at times lead to de-personalization. While social categorization is analogous to the process of self-categorization, in the case of the former, groups differentiate themselves from other groups – in fact, they perceive themselves to be better than other groups- rather than individuals (“us against them”) (Yzerbyt & Demoulin, 2010, p. 1031). The particular relevance of groups and the soldier’s professional self-identity are also discussed in Chapter Three.

### **2.1.2. Conformity and nonconformity**

Conformity can be defined as “a change in a person’s behaviour or opinions as a result of real or imagined pressure from a person or a group of people” (Aronson, 2004, p. 19). This pressure can either be elicited implicitly, that is, it can be expressed, or it can merely be based on a person’s perception. One common example would be the way people dress in their respective environment, such as wearing a suit to work or for a job interview, or a corduroy jacket in an academic environment. In doing so, the individual is attempting to be “in sync” with what they perceive to be accepted by the social group they identify with, or, alternatively, with what they believe should be done. Conformity is thus somewhat dependent on what a person believes to be the norm and what they consider is expected of them.<sup>105</sup>

Nonconformity can be understood as the opposite of conformity, as not being in form with their environment. For example, a banker who wears tracksuit-bottoms to work would stand out by virtue of his nonconformity to those around him. However, at times it is not always possible to distinguish conformity from other forms of in sync behaviour, nor is it straightforward to identify whether there is a demand for altered behaviour, or whether a person chooses the acceptable form of behaviour independent of external influences. Asch referred to subjects who were apparently not influenced by consensus of the majority of the group as “independent”, this term add additional quality: it suggests that the subject thinks or evaluates a situation themselves, while nonconformity only describes the difference in behaviour, someone could be anti-conform all the time, as part of the self-image for example (Allen, 1965, p. 135).

Conformist behaviour may result from expressed (as opposed to merely perceived or subtle) peer pressure. When a person is directly or literally pressured into conformity or threatened with repercussions from lack of conformity, then the resulting behaviour would more likely be akin to coercion, rather than conformity. Of course, the lines may not always be clear-cut, so perhaps it simply suffices to say that the more pressure is exerted, the more conformity becomes coercion.

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<sup>105</sup> By contrast, conformity in the military is of utmost importance: for instance, a uniform is provided and acceptable haircuts are prescribed.

### 2.1.3. Obedience and disobedience

The word “obedience” derives from the Latin verb *obaudiere*, which means to listen to (what has been said). Ordinary people tend to obey – or comply<sup>106</sup> with various forms of authority, often without any awareness of doing so; obedience occurs in manifold shapes and forms, such as stopping at a red traffic light or paying one’s taxes.

In social psychology, obedience ordinarily involves a specific demand being made from one person to another person. Blass defines obedience as “the act of carrying out requests or demands emanating from a person of higher status within a social hierarchy” (Blass, 2001, p. 10765). For example, a request from one’s supervisor at work typically results in the execution of the demanded task. Whether a person is higher in the social stratification most likely depends on whether they are perceived to have the requisite authority or knowledge (Kelman, 1989, p. 54).<sup>107</sup>

Disobedience is the inversion of obedience. Taking into consideration the military definition of disobedience discussed in Chapter One, Blass’ definition can thus be adjusted to define disobedience as *not carrying out requests or demands emanating from a person of higher status within a social hierarchy*.

Both conformity and obedience result from social influences that make people behave differently than they would otherwise have on their own, and comply with a perceived or actual demand (Avermaet, 1988, p. 350). Differences between the terms pertain to the fact that conformity appears to be more complex and subtle than obedience. Obedience requires an authority figure (see section 2.1.4) and an (explicit) instruction to act in a certain way. Conformity, by contrast, usually requires an individual adjusting his or her behaviour to fit the (perceived) remits of a group. For conformity to occur, the presence of an explicit order is not necessary. However, by complying with a group’s actions or opinions, the group/person may be pressured (or perceived to be so) to act similarly, or come to believe that the group behaviour is valid or appropriate (Demeulenaere, 2001, p. 2559).

### 2.1.4. Authority

When it comes to obedience to authority, several interconnected, but not interchangeable, concepts need to be unpacked. Authority can be defined as the “power to influence or command thought, opinion or behaviour”(Wolf, 2006, p. 973). Power, on the other hand, is as follows: “person A has power over person B when A can get B to do what A wants B to

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<sup>106</sup> Compliance has been defined by Kelman as the first form of conformity. Other scholars have defined compliance as: a particular kind of response – acquiescence – to a particular kind of communication – a request” (Cialdini & Goldstein, 2004, p. 592).

<sup>107</sup> Weber argued that in modern bureaucratic societies expertise/knowledge go hand-in-hand with a hierarchical position (in: Kelman 1989).



do, which is something that B would otherwise not have done”.<sup>108</sup> Accordingly, power is part of authority, coercive or otherwise. Authority can be seen as either a quality or a two-way relationship which elicits obedience on the basis of more than fear and coercion (Kelman & Hamilton, 1989, p. 56; Moore, 1978, p. 17). Milgram defined authority as: “consisting of a minimum of two persons sharing the expectation that one of them has the right to prescribe behaviour to the other” (Milgram, 1974, pp. 143-143).<sup>109</sup> Authority as a quality requires some moral obligation and legitimization, otherwise it would not be distinguishable from sheer coercion. Kelman and Hamilton also emphasize the reciprocity of the authority-subordinate relationship, in which the person in the superior position has been granted the (legitimate) power to both decide how his subordinates ought to behave and to enforce punishment if this behaviour fails to occur.

Authorities typically also bear responsibility for the consequences of the behaviour they prescribe (Kelman & Hamilton, 1989, p. 55). Kelman and Hamilton, argue that in the contemporary secular societies, authority predominantly designates a relationship between two sets of actors rather than being vested in a person, such as a king (Kelman & Hamilton, 1989, p. 54). On occasion, an authority might be perceived as legitimate by some, whereas others believe it to be illegitimate; a notable example of this would be the Nazi Party in Germany. It was deemed legitimate by large parts of the German society, while it was (at a certain point) considered illegitimate internationally. Interestingly, while the Nazi Party was initially democratically elected, the rapid increase in coercion that accommodated prescribed behaviour led to a loss of legitimacy.

An authority figure can be perceived as such when he or she fulfils a certain legitimate function in society (police officer, military commander), due to their social status (a king) or because of expertise (doctor, lawyer or professor). The popular phrase that posits that authority can be “exercised” is comparable to flexing one’s muscles, in that it gets stronger the more often it is used (Wolf, 2006, p. 972). Moreover, authority, like muscles, does not necessarily need to be used in order to influence people; rather, its presence alone can deter or influence others.

While obedience is indeed a common response to authority, it is not the only one: some people actively disobey people who “exercise” authority over them. Disobedience, in that sense, comprises any deliberate non-execution of a request or demand deriving from a source of authority. In many situations in (social) life, disobedience can have harmful consequences, such as if one disobeys a traffic law or drives through a stop sign. In such scenarios, disobedience can lead to an accident because other drivers expect the person to stop the vehicle at the stop sign. Disobedience can also designate committing crimes such as murder or rape, which are prohibited by the authorities. The situations that are of relevance for this

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<sup>108</sup> Wolf refers to Dahl (1957) and states that Dahl’s definition of power is widely accepted.

<sup>109</sup> Authority is generally used to coordinate the activity of a large number of people and it reaches into all areas of social life, even in primitive societies (Moore, 1978, p. 15).

study refer to those scenarios discussed in Chapter One, in which an authority (a superior) demands an illegal or wrongful action to be performed. In the process of ordering an illegal act, although a superior may partially undermine their legitimacy, they still have the ability to influence their subordinates due to the coercive power the (former) legitimate authority possesses. Before the chapter discusses findings from experiments regarding (dis)obedience to authority, findings from social psychological experiments regarding conformity and nonconformity are dealt with first.

## **2.2. Conformity and nonconformity in experiments**

In society, people interact with, and indeed are dependent on, other people. They act out their roles and have mutual expectations about what constitutes appropriate behaviour, which is part of general societal functioning (Kelman, 2006, p. 11). Conformity occurs when an individual augments his or her behaviour or attitude due to either manifest or perceived pressure from a person or a group of persons. This pressure may be explicit or implicit, that is, triggered by the desire not to avoid censure, ridicule or social disapproval (Hogg, 2010, p. 1179).

Society requires its members to have norms and patterns of behaviour that allow people to (re)produce their respective culture(s). A distinction can be drawn between injunctive and descriptive norms: while the former refers to those norms that guide people's attitudes, descriptive norms provide a blueprint of what behaviour is appropriate in a specific situation. It is not necessary to completely agree or go along with these ascribed patterns of behaviour; all that matters is that there is loose agreement in a group about what types of behaviour are appropriate. On the contrary, nonconformity can sometimes be seen as unpleasant or disturbing, depending on the group preferences and the prevailing societal values at a given historical juncture (Aronson, 2004, p. 12). In the military, as will be discussed in detail in the subsequent chapter, conformity (injunctive and descriptive) among personnel is institutionalised.

First, section 2.2.1 introduces the salient studies on conformity conducted by Asch and outlines variables found that likely affected the rate of conformity and the persistence of independence. Furthermore, the section explains classic distinctions between the duration and intensity of conform behaviour based on Kelman's theory. In section 2.2.2 internal factors and motivations for conform behaviour are explained before section 2.2.3 finishes with focussing on groups and nonconformity.

### **2.2.1. The Asch experiments and Kelman's theory**

One of the best-known studies of social influence is Asch's (1956) conformity experiment, in which young men adjusted their own judgment about the length of a matching black line to the (obviously) erroneous consensus of the group (Cialdini & Goldstein, 2004). Asch

referred to the subjects who did not adjust their behaviour as “independent”. Asch’s landmark study was concerned with the “condition of independence and lack of independence” or submission (Asch, 1956, p.1). Asch tested whether his subjects would express their (honest) answer if the majority of people present disagreed with it.

The experiment was designed to expose naïve subjects to an easy task in which they had to match a vertical black line to other lines of equal length. The subjects were confronted with surprisingly different answers from all the other ostensible subjects, who in fact were confederates. First, the accomplices stated a false match between two lines. Then, it was the subject’s turn to share their judgment. The effect of the majority opinion ranged, about 25% of individuals always remained independent, and about 50 % of the subjects yielded to the majority at some point in the experiment, while 25 % always bowed to the majority opinion (Asch, 1956, p. 17). The conclusion was thusly that with 25 % independent, the majority (75%) of subjects yielded to the group at some point. While Asch found differences in the external factors (for example how obvious the error was) he concluded that no factors are more decisive for the effect of majority than personal factors (Asch, 1956, p. 19).

Immediate follow-up studies conducted by Deutsch and Gerard (1955) concluded that it was important to distinguish between public and private modes of conformity. They referred to private conformity as occurring when subjects truly began to believe in the new behaviour or attitude, whereas public conformity pertained to people who only pretended to conform because they were aware of the potential negative consequences of nonconformity. A person can act conform publicly while privately agreeing or disagreeing with the displayed behaviour (or the reversed, but that scenario is less relevant for the present approach) (Allen, 1965, p. 137). For example, a soldier who vehemently opposes to referring to all Muslims as terrorists may make his opinion known to others; and stick to his original (openly stated) opinion, even if the comrades attempt to convince him otherwise. By contrast, someone who may have not made up their mind, may adopt the view of a group more easily, as they have no prior opinion to stick with.

Kelman (1958,1961) distinguished between forms of conformity based on the duration and depth of the respective behaviour. He argued that conformity can be placed on a continuum ranging from compliance to identification and then internalization. It should be noted that a person can first comply and then subsequently conform, either because he identifies himself with a leader or because he has truly accepted the adjusted behaviour as the (new) norm. The duration and intensity of conforming behaviour varies from being short-lived and based on gaining rewards and avoiding punishment to being completely internalised by the individual. The first concept described by Kelman is compliance: here, although a person changes their behaviour (or expressed their supposed opinion), without being required to agree with the behaviour change he or she is displaying. It should be noted that obedience can also be referred to as compliance, because it also constitutes a short-term change of behaviour (Cialdini & Goldstein, 2004).

Conformity in the form of compliance may be superficial in nature, such as a teenager who buys certain clothing because they do not want to be excluded. Another example would be a soldier overtly referring to Muslims as terrorists, because most of his comrades do so and he does not want to stand out, but in actuality, he does not believe that this is the case. While the soldier's conformity with his comrades' generalisation is superficial, the social context often plays a crucial role in increasing the likelihood for compliance in soldiers, as will be discussed in Chapter Three. The individual ordinarily adapts her or his behaviour to either secure social acceptance and other rewards, or because she or he aims to avoid rejection or other punishments. Compliance can in this respect constitute a conscious cognitive process: the person is aware that they do what they are told to do and weighs-up the consequences of doing so (a goal-oriented motivation) (Bargh, Gollwitzer, & Oettingen, 2010, p. 281). Compliance is thus only as long-lasting as the promise of reward or the threat of punishment.

The second type of conformity that Kelman delineates is conformity as a result of identification. In cases of identification, a person identifies himself or herself with another person. For example, a U.S. soldier who identifies herself with other soldiers who refer to all Muslims as terrorists may simply start using the term to feel accepted, without really thinking about what she is saying. Alternatively, she may also accept the term because she likes the group and prefers to go along with what the group does. A person can also adopt the opinion and values of an "influencer" or role model, albeit this process is a lot less straightforward. In contrast to compliance, where the conforming individual is motivated by the fear of being ousted or the desire to be rewarded, identification is based on attraction to the influencer. Identification can also occur in a group setting, because members desire to be like the source of influence (either the charismatic leader or simply being accepted by the in-group). Consequently, the source of identification-based conformity is deeper than with compliance, where the individual merely seeks to avoid the negative consequences stemming from non-compliance.

The third, and deepest, most enduring change of behaviour or attitude is internalisation. As the name suggests, in this type of conformity the individual internalises and wholly adopts a group's ideology, behaviour or opinion as his own and integrates it into his repertoire of cognitions. In doingso, the opinion subsequently becomes independent of its source, which means that the person will express the opinion even if the person who influenced them is no longer present. This is the most extreme mode of adaptation and the most enduring form of change, because the person has truly changed their beliefs. The underlying rationale for internalising an opinion is that the person believes the initial source of the opinion to be trustworthy and the internalizing person wants to be right. At this stage, the person may simply display the behaviour as if it is a part of their natural repertoire of behaviour. In the case of soldiers, they may internalise the belief that all Muslims are indeed terrorists, or, at the very least, potential terrorists or supporters of terrorism. Such a belief can play a significant role in an individual's decision-making when faced with a dilemma such as an illegal order.

### 2.2.2. Explanations for conformity

There are manifold explanations for why people conform to a group's implicit or explicit norms. Human beings have a fundamental need to create and maintain social relationships with other people (Cialdini & Goldstein, 2004). Social psychologists understand motivations to be the principal driver of why persons select a certain course of action over others; they can manifest themselves cognitively, affectively and behaviourally (Bargh et al., 2010, p. 268; Kelman & Hamilton, 1989). Initially, research on conformity distinguished between normative and informational motivations or needs (Deutsch & Garard, 1955). With respect to normative conformity, individuals are motivated by either rewards, such as love or acceptance, or by avoidance of punishments, such as rejection or ridicule. By conforming, social actors will display the "right" behaviour, avoid being disliked for disagreeing and rewarded for their conformity (by being accepted by the majority). Group members often want to belong, and, as such, they feel a strong internal pressure to comply and conform (Aronson, 2004, p. 23). Normative conformity is likely to start out as public conformity, but over time becomes more internal and perhaps eventually morph into private conformity. The normative desire can be either conscious or unconscious.

In all likelihood, many of the subjects who conformed during Asch's experiments did not initially truly believe that the line they stated was indeed a correct match. Asch observed in the post-experimental interviews that most of the pliable subjects felt that the majority was wrong during the experiment (Asch, 1956, p. 28). Rather, they sought to avoid standing out by being the only one to make a different judgment. This could be considered taking the path of least resistance. Normative conformity refers to the standard or norm of accepted behaviour at a given historical juncture. Normative is "what one ought to do as a group member" (positive sense) rather than being normative in the deontological sense, that is, one ought to do it because it is the right thing to do as such (in a natural sense). People desire approval from others. One way to gain such approval is by agreeing or engaging in what they consider to be appropriate modes of social exchange. That is to say, people adjust their cognitions and behaviour to those of others, because they are more likely to feel accepted by them if they are all in agreement (Asch, 1956, p.4). This affiliation with others is a key motivation underlying conforming to a group, in that it may lead to the development or maintenance of social relations. This motivation can also be understood through recourse to the concept of social identification, that is, a person's desire to be similar to other group members. The potential (expected) rewards from conforming can consist of manifold social benefits, such as gaining comfort and safety from being part of a group and enhancing one's self-esteem via agreeing with others. The social punishments that people try to avoid are primarily rejection and ridicule (direct response from others), as well as perceived uncertainty about not belonging or being seen as wrong.

Conformity can also be induced due to an informational need. In the case of Asch's experiment, individuals would begin to believe that their initial behaviour or opinion was indeed wrong, as they came to be convinced by the overwhelming opinion of the (majority

of the) group. Outside of the laboratory context, wanting to be right or correct can take different forms depending on the situational context. For example, a person can be truly convinced by others when they have no information about a situation, in which case the behaviour of the group is their only guide to appropriate action. Soldiers often have to solely rely on information received from superiors and comrades. Aronson argued that when physical reality becomes increasingly uncertain, people rely more on social reality, and, more specifically, information from other people (Aronson, 2004, p. 23).<sup>110</sup> For individuals who refrain from conforming to a group they believe is wrong, it can be speculated that they rely on their independent judgment and are less driven by an external normative approval from the group.

When it comes to how an individual decides (consciously or unconsciously) to take any certain course of action, the decision-making and underlying cognitions can be impacted by several biases and errors (Wade & Tavris, 2002, p. 198). When people make decisions, they rely on mental images about the situation and the self (Wade & Tavris, 2002, pp. 190-191). As aforementioned, self-identity refers to people's mental representation of who they think they are and what they think they should do. People's self-images interact with their environment, and ultimately inform their thoughts and behaviours. In addition, the experiences people have and the feedback they receive also modify people's self-perceptions. It is a fundamental need for human beings to behave in a manner consistent with their statements, commitments, beliefs and self-ascribed traits (Cialdini & Goldstein, 2004, p. 602). The need for consistency can account for both conformist and independent responses (Allen, 1965, p. 147).

One notable difference between consistency pertaining to the motivation for affiliation with others and consistency in order to maintain one's self-identity concerns the fact that the former is more outward-looking, while the latter is more inward-focused and based on a person's subjective desire, such as to be correct in one's judgment. Numerous explanations account for people's decision-making in a dilemma, in addition to people's conscious cognitions, are underlying subconscious (automatic, learned) unconscious (similar, but less easily retrievable), and nonconscious (not accessible for the conscious awareness) mechanisms. The subsequent chapter will deal in greater detail with cognitive conflicts and their reduction (i.e. people naturally tend to reduce cognitive tension (or "dissonance") by for example rejecting a belief, changing their behaviour, denying evidence or rationalising in other ways (Wade & Tavris, 2002, p. 202).

In a dilemma, be it in an experiment, or in a real life situation, most people have to rely on dialectical reasoning, that is, they have to compare and evaluate opposing views, demands and consequences (Wade & Tavris, 2002, p. 195). For example, people can reflect (briefly) on their arguments to raise their opposing opinion, or to keep quiet, but most situations do

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<sup>110</sup> Festinger defined social reality as follows: "Opinions, attitudes, and beliefs which people hold must have some basis upon which they rest for their validity" (Festinger, 1950, p. 272).

not lend themselves to offer people sufficient time for a reflective judgment (ibid.). Furthermore, rational reasoning, for example regarding what action to take especially in light of having to face a group or an authority can be limited and subject to the following biases and errors:

- people want to be right (informational need) and adjust their belief about what is correct,
- people use mental sets (i.e. using previously applied heuristics),
- people tend to be mentally lazy and choose the path of least resistance,
- people have a confirmation bias (i.e. a pre-existing mental idea leads people to pay more attention to what they already believe, disregarding opposing arguments,
- people are affected by a hindsight bias (i.e. after learning the facts, people think they knew it beforehand when trying to make sense of the past)
- people tend to avoid risks and losses in general (Wade & Tavis, 2002, pp. 198-201).

If a subject knows he will be subsequently held accountable for his position, this makes a crucial difference with regards to whether a person will conform to a group that he thinks is wrong (Aronson, 2004, p. 20). People were less likely to adjust their behaviour to that of the group after they had been instructed beforehand that they had to justify their decision (Quinn & Schlenker, 2002, p. 472).<sup>111</sup> They acted with a much higher degree of independence having been specifically asked to be accurate and when preferences of the group norm have been made known (ibid., p.481-482). With respect to soldiers, this could mean that if they know that they will most likely never be held accountable for war crimes, then they might be more inclined to commit them if influential comrades are also committing them. By contrast, emphasising individual accountability to soldiers may also increase their deliberate non-participation in war crimes. For that reason, systems of legal accountability, such as the legal duty to disobey that was discussed in Chapter One, could act as a deterrent or incentive, if they are properly implemented and effective.

### **2.2.3. Nonconformity and groups**

The nature of the group can also influence and interact with the individual motivations to conform behaviour. First, the attractiveness of the group can affect a person's compliance with social norms (Festinger, 1950). The scholars demonstrated that if a group comprises friends, then conformity increases, in other scenarios, the attractiveness of the group was enhanced by telling subjects about their "good match", i.e. how well subjects would get along

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<sup>111</sup> This research takes the approach that "accountability refers to being answerable for one's decision and behaviour" (Quinn & Schlenker, 2002, p. 472).

(or otherwise) (Festinger, 1957).<sup>112</sup> Hence, if a soldier is surrounded by friends who are committing crimes, then it may be harder for them to not go along with the crowd. At the same time, if a soldier's environment or group contains comrades who do not take part in atrocities that other soldiers perpetrate, then they may also be more inclined to refrain.

Secondly the size of the group and the unanimity can have impact, especially if the individual finds themselves in a novel situation. Generally speaking, in situations of uncertainty, people look to others to define what to do, that is, to (re)produce a social reality (Cialdini & Goldstein, 2004; Latane & Nida, 1981). Scholars have found a significant difference in levels of conformity depending on the conditions under which the response is given; more specifically, whether subjects had to offer their opinion in public (the group), or anonymously and secluded from the group (Asch, 1956; Deutsch & Garard, 1955). At the same time, when a group appears to be convincing, individuals may be more likely to change their private beliefs (Allen, 1965; Asch, 1956, p. 147).

Individuals differ with respect to their personal susceptibility to group norms, on the basis of their self-esteem. People with low self-esteem tend to generally be more likely to yield to group norms (Aronson, 2004, p.23). This can be explained by referring to an insecure self-image, which most likely results in greater self-categorization and increased social or group-identification. If people do not feel secure or good about themselves, then they may find more validation in acting as other people do. Conversely, a person's confidence can also be low with respect to the specific task at hand (Allen, 1965, p. 166). That is to say, a person can be more convinced of -and insistent about- their own opinion when he is an expert in that particular task or field (Krech, Crutchfield, & Ballachey, 1962). By contrast, high self-esteem and confidence are likely to increase a person's nonconformity, because they have less need to be accepted.

For example, the individual roles within groups are likely to have an impact on whether the individual conforms or not. Indeed, leadership appears to be a relevant factor in conformity. Leaders of small (natural) groups are less likely to conform (Harvey and Consalvi, 1960, in Allen, 1965, p.153). However, leadership and popularity are also often strongly correlated (Allen, 1965, p. 153). Interestingly, both well-liked and disliked individuals have been shown to be less likely to yield than their "averagely liked" counterparts (*ibid.*). One explanation for this could be that leaders can afford to be insistent with their attitude, while outsiders, who are disliked anyway, will not lose face if they do not conform. Indeed, perhaps outsiders are outsiders for the very reason that they do not conform to the group, while leaders are leaders precisely because of the fact that they can convince groups of what they believe to be right. While rules and regulations prescribe which behaviour is appropriate in the military, in reality, it might be an informal group-leader who sets the norms to which comrades conform,

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<sup>112</sup> However, some researchers found less significant results (Allen, 1965). This may be due to the operationalization of attractiveness, and whether the individual believed that conforming to the behaviour of the group produces rewards or not (Allen, 1965, p. 151).



while disliked comrades who stand out anyway may be less inclined to conform to the group to which they do not belong.

The fact that experiments have empirically demonstrated changes in behaviour are critical for understanding the social influences on people and soldiers, despite the fact that in reality many other uncontrolled factors may impact upon a person changing their publicly stated opinion. Kelman proposed that there were three levels of conformity: compliance, identification and internalisation (Kelman, 1961). Such distinctions are expedient for helping us understand the extent to which individuals believe in the behaviour they are mimicking. More recently, scholars have added the need to maintain a positive self-concept to the aforesaid desire to be accurate and belong to the group (Cialdini & Goldstein, 2004). This preservation of a “good” self-image can lead to cognitive processes, such as genuine changes of opinion, or rationalizations necessary to justify one’s actions (Festinger 1957).

A number of studies have investigated whether there are cultural differences regarding conformity (Cialdini, Wosinska, Barrett, Butner, & Gornik-Durose, 1999; Smith & Bond, 1996). Both Smith and Bond (1996) and Cialdini et al. (1999) found in their cross-cultural studies of conformity that residents of collectivist countries (e.g. China or Russia) were more inclined to conform than those who reside in individualistic states (e.g. U.S.). This is because cultures ascribe different meanings to conforming or nonconforming. For example, in the U.S. people are encouraged to stand out and be “the way they are”, while in many Asian states nonconformity constitutes a form of deviance (Kim & Markus, 1999). The subsequent section deals with what is known about people’s refusal to carry out specific demands, namely disobedience to authority.

### **2.3. Disobedience in psychological experiments**

Findings on why people conform to a group can help explain why soldiers may adapt their behaviour to the norm of the group, even if the group’s behaviour is destructive. Soldiers are like every person, members of a group, to which they adjust or not. Furthermore, soldiers are not only influenced by their surrounding group, soldiers also have to obey orders from their superiors. Therefore, the findings from socio-psychological studies on obedience and disobedience are expedient to better understand individuals’ responses to “wrongful” demands from an authority.

Children are taught to be obedient by their parents and their teachers. As part of the so called socialisation process, children are required to learn how to conduct themselves in society: from strict rules such as: “you may not cross the road”, “do not hit your younger sister” to norms: you should always say “please” and “thank you”. A child first learns from their parents and teachers what they ought to do, but subsequently learns from observing their friends and siblings. This type of learning, based on experience and observation, is referred to as social learning (Bandura, 1969). Obedience and disobedience can also be learned by

observation; for example, youngsters observe that their parents pay their taxes, halt at a red light and potentially get nervous when they are stopped by a police car after driving too fast. “Socialisation”, the process of acquiring and imprinting the social rules and norms that are required for adequate social behaviour, takes place over a period of time and cannot be directly observed. Milgram argued that people have been socialised into obeying orders from authority and that they have internalised the principle of social order (Milgram, 1974, pp. 138-139).

Internalization refers to the inner process by which people make beliefs their own (see above) and can be understood as an internal form of socialisation. In order to understand why people behave as they do, we must take into account more than merely the immediate context: aside from the families children are raised in, they make friends and acquaintances, and are potentially influenced by the church or their beliefs. Furthermore, they attend school, have classmates and teachers, and live in a specific social environment that evolves over time. Every individual derives a unique set of attitudes, moral values, and norms. Norms are a set of unwritten rules of how to properly behave in society (Gibbs, 1965). These behavioural guidelines are intrinsically linked with the society, community, social class and the unique social environment that an individual grows up in. In the later stages of their lives, young people are exposed to additional clues about what is appropriate from their teachers or their social environment.

Milgram posited that “life in society depends upon obedience” (Milgram, 1963, p. 271). One broadly accepted construct in sociology is the so called social contract theory: social contract thinking is based on the seminal work of Hobbes, Locke and Rousseau, who argued that people delegate the authority to govern to a legitimate body, which creates rules and has the right to use force, in everyone’s (collective) will or interest (Swift, 2001). In return for deferring to this authority, people receive structure and security. Without such imposed structure and laws, society would be chaotic. An example of the social contract is the simple fact that people accept the command to stop at a red light. Whilst stopping in front of a red light restricts the individual to some extent, the regulation also protects the individual from other members of society. People who are reluctant to stop at a red light (law breakers) can be punished (or threatened with punishment) by authorities. The authorities also make criminal laws, and determine the behaviours that are *mala in se*, which will lead to criminal prosecution, and serve to deter people from breaking the law. Such a system is rational, with respect to the tenets of social contract theory, in that it legitimizes authority and generally seems to be necessary for the peaceful functioning of society.

Yet, when the authority demands a destructive action, the person often finds themselves in a dilemma, neither wanting to hurt someone nor wanting to stand up to the authority. Obedience to authority is a key form of social influence that must be considered when studying soldiers’ disobedience.

How this dilemma has been studied in experiments and which findings might apply to soldiers in their dilemma will be discussed below. First, section 2.3.1 introduces the classic Milgram studies, and discusses in how far findings are relevant for the present study. The well-known Milgram experiments demonstrated that even people outside the military carried out instructions from what they perceived to be a legitimate authority figure, even though they were led to believe their actions harmed a third, innocent person. The original Milgram experiments are considered, along with various replications and follow-up studies, to understand what is currently known about obedience and, more specifically, disobedience. Subsequently, section 2.3.2 deals with explanations for obedience and factors that are believed to have a moderating effect. Aside from the differences between experimental settings and real-life situations, the present study relies on situational or external modifications that led to different rates of disobedience and internal or personal factors that have been associated with disobedience.

Finally, section 2.3.3 looks at some individual disobedient subjects of the Milgram experiments and explores how their disobedience has been explained (Gibson, 2014; Hollander, 2015).

### **2.3.1. Milgram's obedience to authority experiments**

In total, approximately 3000 individuals participated in the original experiments and subsequent, altered replications; the Milgram experiments alone comprised over 800 subjects, across all the experiments conducted over several years in a variety of countries (from the U.S., to Germany, Jordan and Australia), in which many people carried out orders from the authority figure (Blass, 1991, 1999; Kilham & Mann, 1974; Meeus & Raaijmakers, 1995; Milgram, 1974; Miller, 1995; Modigliani & Rochat, 1995; Schurz, 1985; Shanab & Yahya, 1977).<sup>113</sup>

Milgram asked hundreds of citizens to take part in a supposed learning experiment, across 24 experimental designs (of which 18 feature in his book): the naïve subjects believed that they were assuming the role of a teacher who had to administer light electric shocks to a “learner”, who was in fact a confederate, or accomplice (Perry, 2012). For each time that the learner made a mistake, the shock would increase by 15 volts on the shock generator that went up to 450 volts. While the subjects believed that they were teachers by sheer chance, in fact, the selection was contrived so that the subject would always be in the teacher role, see Figure 3. In order to convince the teachers of the reality of the experiment, they themselves received a test shock of 45 volts. The experiments also involved an apparent experimenter who served as the authority figure and was “leading” the learning experiment. The (wrong) answers that were given by the learner were prerecorded (as well as other statements and

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<sup>113</sup> Blass (2009) ran a correlation between obedience and time in a follow-up study and found that there was no relation at all, thus indicating that there was no reason to expect lower obedience rates in the 21<sup>st</sup> century compared to the 1960s.

expressions depending on the experimental design), while the instructions, reinforcements and prods given by the experimenter were also standardised (Milgram, 1974, p.23).

### The Milgram Experiment

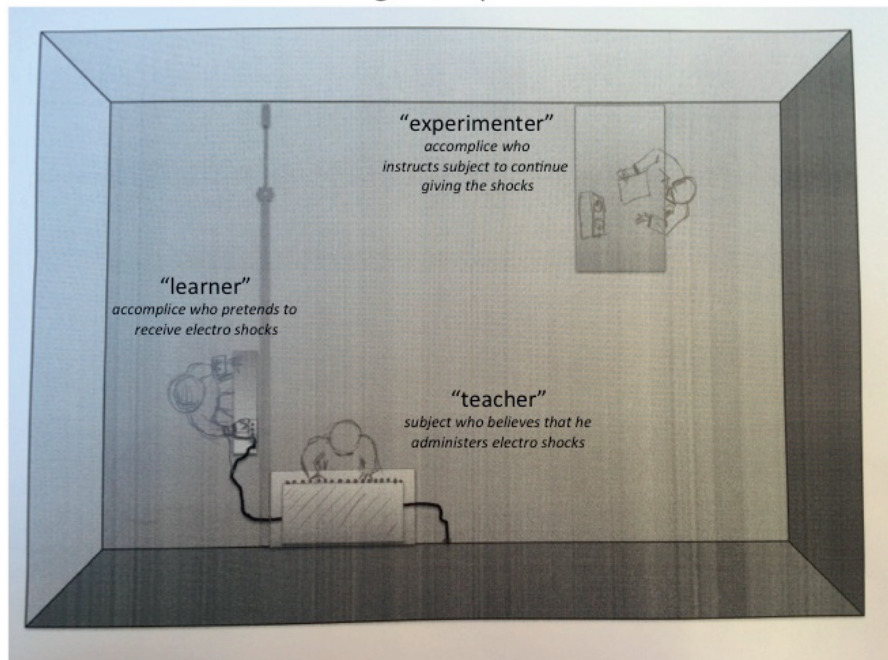


Figure 3 The Milgram experiment

Contrary to all expectations,<sup>114</sup> Milgram found that with little pressure (reinforcements to administer the shocks), a surprising majority of people continued until the end of the scale, at which point they would have administered a deadly shock to the "learner" (Milgram, 1974, p. 56).<sup>115</sup> This constitutes the commonly cited percentage of "total obedience": 65% of the subjects went all the way until they thought they gave someone else a 450 volts shock. The experiments were thus said to have demonstrated that, in the majority of cases in which an authority figure required an individual to conduct an immoral and potentially harmful action, a vast majority of people, depending on the circumstances, felt discomfort and unease but were nevertheless unable to find the means to translate this conviction into action, instead continuing to go along with the demands (ibid., p. 67).

<sup>114</sup> When Milgram explained the experimental design to college students, middle-class adults and psychiatrists to let them estimate how many people would in fact go all the way to 450 volts (which in real life would result in a deadly shock), people predicted that 100 % would break off and disobey the experimenter at a maximum of 300 volts, with a majority already refusing at 150 volts (which is where the learner makes his first explicit demand to be let out of the experiment (Milgram, 1963, p.30). When the psychiatrists estimated the average American response, they only believed that one percent would go up to 450 volts, and that these people would represent the pathological fringe (ibid., p.32).

<sup>115</sup> These findings refer to Experiment 5, the baseline condition.

The outcomes of Milgram's study on obedience to authority "shocked the world", because around 65% of people (depending on the variation) failed to refuse the experimenter's demands. Yet, the obedience to authority studies contributed in manifold ways to the better understanding of people's behaviour, as scholars investigate elements of the study that received less attention in the past (Gibson, 2014; Haslam, Reicher, & Birney, 2014).

Milgram sought to test whether the physical presence of the authority figure impacted upon subjects' behaviour. In Experiment 7, the distance between the authority figure and the subject was increased to measure whether this impacted on the obedience rate. Indeed, when the experimenter left the room and gave his instructions by telephone, only nine out of 40 subjects fully obeyed (20%) (Milgram, 1963, p.60). Some of the subjects even went so far as to pretend that they were giving higher shocks than they actually administered (*ibid.*, p.63). This "secret" behaviour, whereby subjects were neither disobeying the experimenter nor doing what they felt was wrong is of critical relevance for the present study and can be understood as a mode of indirect or evasive disobedience. Through this strategy, the individual did not have to break with social etiquette (confronting the authority/refusing), while, simultaneously, minimizing their own discomfort about giving painful shocks. Accordingly, when an authority figure is not physically present, people may be more likely to act according to their own judgment.

The physical presence of an authority who does not give immoral orders most likely also affects individuals in normal situations: as aforesaid, while one does not cross the road during the middle of the day when the traffic light is red, in the middle of the night, when no authority is watching and no other person is in sight, we may be more flexible regarding displaying strict obedience to traffic laws. Milgram also tested social variables, such as whether an individual felt more empowered to refuse a malevolent authority when they were supported by others. Indeed, when two other teachers refused to continue, 90 % of the subjects followed suit (see Experiment 17, *ibid.*, p.119). The drop in obedience from 65 % to 10 % supports the general idea that opposing authority is easier in groups.<sup>116</sup>

Milgram's findings have been extensively cited in studies of soldiers who commit crimes of obedience and are therefore crucial to take into account when studying explanations for why and how soldiers obey and disobey (Bradley, 2011; Kelman & Hamilton, 1989; Smeulers, 2008, 2011; Smeulers & Grünfeld, 2011; Talbert & Wolfendale, 2019; Tripodi, 2011a, 2011b; Waller, 2010; Wolfendale, 2007; Zimbardo, 2008).

Prior to Milgram's study, scholars and laypersons were ignorant about how far ordinary people would go (under experimental conditions). No one predicted that any subject would

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<sup>116</sup> This finding was confirmed by the Utrecht Studies, which tested obedience to unjust bureaucratic demands (Meeus & Raaijmakers, 1995). In these studies, obedience was tested in the form of emotionally disturbing a supposed job applicant. The subjects disliked treating other individuals badly and also found it more straightforward to refuse when other supposed subjects also refused (Condition 7, Two Peers rebel (Meeus & Raaijmakers, 1995, p. 162).

be willing to administer a 450 volts shock when requested to do so by a higher authority, except perhaps the representative sadist population (Milgram 1974, p.32). The groundbreaking Obedience to Authority studies raised many issues related to ethics and deception in research (Baumrind, 1964), so that the manifold replications had to make considerable alterations to the experimental design due to the fact that ethical boards would no longer allow such emotional harm to research subjects. However, in 2006, Burger ran a similar experiment (stopping earlier at the crucial 150 volts mark) in which the basic findings (65% conformity) were confirmed (Burger, 2009).

Critical assessments on the classic study raised concerns for example over the internal validity and whether subjects in fact believed that they shocked someone (Orne & Holland, 1968), the weakness of Milgram's own "agentic state" explanation (Reicher et al., 2014) and Milgram's disregard for disobedience in general and downplaying of the relevance of the interaction between the "professor" and the subject, and other forms of resistance (Gibson, 2014; Hollander, 2015; Modigliani & Rochat, 1995; Perry, 2012). While the criticisms can not be ignored, they do not change the ultimate finding that a larger than expected group of people did not succeed in defying an authority figure in an experimental setting. The subsequent section looks at explanations for obedience and moderators that increased or decreased the rate of disobedience in experimental settings.

### **2.3.2. Explanations for obedience**

According to Milgram, a number of so called "binding" factors prevent people from translating their moral considerations into acts of defiance, because they "bind" the subjects to the experimenter and to the continuation of the procedure (Milgram, 1963, p.149ff). Milgram (1963) reported several observations concerning the tensions his subjects experienced as a result of the conflict. The psychological reactions included trembling, anxious laughter or acute embarrassment (Milgram 1963, p. 68). Even though the subject disliked shocking the learner, he or she did not find a way to convert this discomfort into action (or did not know how to disobey) (ibid., p. 68). One reason why people potentially obey authority is a fear or anxiety about the possible reactions from the experimenter if one were to disobey. Whether or not the experimenter is seen as a (legitimate) authority also accounts for obedience and disobedience, respectively.

Psychological (defence) mechanisms allow people to maintain a positive self-image while conducting immoral acts. Understanding these processes not only proves useful for explaining why people obeyed, but is also expedient for identifying which mechanisms failed to "empower" subjects to defy authority figures. Whilst these mechanisms are predominantly relevant for understanding obedience, they may also apply to conformist and nonconformist behaviour, specifically cases where a group is involved in unjust deeds.

Defence mechanisms have long been associated with Freud's psychodynamic explanation of unconscious coping strategies, such as denial or disassociation. Today, developmental,

personality, and social psychologists have all found support for how defence mechanisms explicate psychological functioning (Cramer, 2000).

“Normal” individuals (i.e., persons with no major pathological dysfunctions) internalise through ongoing socialisation the moral injunction to not harm other people. Consequently, when such an individual is now asked by a person of higher professional status to do harm to someone else, then the individual will experience stress because this goes against one of the strongest principles they have learned. These two principles culminate in two conflicting cognitions: “I must not do harm to innocent people” and “I must do what the (legitimate) authority tells me to do” – a cognitive state that Leon Festinger (1957) designated as “cognitive dissonance”. As one would suspect, it is difficult to simultaneously uphold these two incompatible thoughts, and, as such, people either change their behaviour to eliminate one source of the dissonance or they minimise the discomforting feeling by “adjusting” their cognitions. Rationalisation is a highly efficient defence mechanism, which allows individuals to “defend” their moral sanity, or, as ironic as it may seem, their integrity.

As aforesaid, people have a need to feel good about themselves; thus, administering an electro-shock to another person who is crying out in pain will not contribute to a positive self-image. Therefore, the person will either stop pressing the trigger to shock the learner, or they will defend, justify, or rationalise the cognition about the action. This rationalisation takes manifold forms. Milgram explained that the person in this difficult situation is likely to enter or accept the so called agentic state: when carrying out the demand (to administer the shock to the learner) which goes against what they would normally do, the person comes to view him or herself as an instrument that is carrying out another person’s (the experimenter’s) wishes, and, as such, he or she no longer regards him or herself as being responsible for the consequences of his or her actions.<sup>117</sup> According to Milgram, in doing so, the individual no longer regards herself as an autonomous actor, but rather as an “agent” acting on behalf of someone else (Milgram 1975, p. 134). Other scholars argue that the subjects identified with the “professor”, as will be discussed below. This adjustment of one’s cognitive functioning can also be understood as a denial of responsibility.<sup>118</sup>

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<sup>117</sup> “The most far-reaching consequence of this agentic shift is that the individual feels responsible *to the authority directing him, but feels no responsibility for the content of the actions that the authority prescribes. Morality thus does not disappear, but acquires a radically different focus*” (Milgram 1975, p. 145). This process is central to obedience, because it allows for a state of mental organisation which enhances the likelihood of obedience (ibid., p.149). The subject who enters the agentic state (ordinarily) wishes to perform and come across well (in the eyes of the authority), which often leads to a focus on the technical details – up to the point where the individual finds himself absorbed in the narrow technical tasks at hand (ibid, p. 145).

<sup>118</sup> According to Milgram, an additional mechanism that is likely to occur is *tuning*. Even though the subject experiences a conflict between not wanting to hurt the learner nor displease the experimenter, subjects are nevertheless more receptive to the authority’s speech than those of the learners, whose cries were often silenced (and psychologically remote) (Milgram 1974, p.145). In this respect, the authority appeared to be perceived as something larger than the individual (ibid., p.146). Tuning can thus be conceptualised as an unconscious selective perception of reality, or as form of denial concerning the harm that the subject is supposedly causing the victim. The reality in the experiment was defined by the experimenter, of course, as he ultimately provides meaning to the situation that transcends the old principle of not doing harm to others; instead, the subject comes to accept that the continuation of the experiment is of the utmost importance, and the harm is tuned out.

Through the use of the graduated shock levels, subjects were “shaped into obedience”, as the procedure itself began to gain its own momentum (Gilbert, 1981). Because of the very low start (15 volts), the incremental increase of 15 volts shocks, and the building of momentum within the procedure, subjects ultimately failed to recognise the qualitative difference with the shock levels.<sup>119</sup> Consequently, this made it difficult for people to find the right moment to resist, as the experiment started off “harmless” and only became harmful over a series of small morally grey steps. By the time the individual decided to disobey, they had already administered shocks and thus would have had to face the consequences for doing so, not to mention that the situation was novel and the ultimate responsibility could be placed on the authority (Pina e Cunha, Rego, & Clegg, 2010, pp. 293-294). This technique has been labelled “foot in the door technique” by Freedman and Fraser (1966), and as the term itself literally describes, it refers to the psychological tendency of people to continue what they have started. Hence, after a person agrees to a small request (the requester gets his foot in the door), he is likely to gradually agree with other small demands, while her commitment gradually increases, in line with her need for consistency.<sup>120</sup> It is important to remember that subjects voluntarily signed up to Milgram’s experiment, knowing nothing about what it would entail other than the fact that they were making a contribution to science.

During the introduction to the experiment, subjects had no time to reflect upon what was required of them. Once the subjects experienced discomfort or stress about having to administer the shocks, the person was likely to already *be too far in*. As aforesaid, people have a natural tendency to finish what they start, and thus withdrawing from the experiment would have constituted a breach of social etiquette, a disruption of the social order and been considered a moral transgression (Milgram, 1974, p.151). The obedient subject likely wants to preserve the experimenter’s status and dignity, and thus acts in a “compassionate” way so as to not hurt the experimenter’s feelings (*ibid.*, p.152).

The initial explanations for obedience and disobedience based on differences in personality traits were explored by Milgram and his research assistant, Elms (Elms, 1995; Elms & Milgram, 1966).<sup>121</sup> Milgram and Elms concluded: “The results of this study suggest certain

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<sup>119</sup> Another important aspect in terms of *justifying* obedience to authority is that the demands from the authority gradually increased. Through this incremental nature of the shocks, the subjects gained momentum: they were engaged in and committed to a social interaction, but did not immediately notice the “ugliness” of the situation. On this continuum, each shock is only a little more than the previous one, and not itself a “reason to quit” (Gilbert, 1981). The 150 v mark constitutes the obvious exception.

<sup>120</sup> As opposed to the door in the face technique, whereby an individual gets overwhelmed with a huge demand at first, and then is more likely to comply with a relatively smaller one afterwards, which they would have not agreed to if it was asked of them at the onset.

<sup>121</sup> Milgram and Elms interviewed around 200 of the subjects who participated in his experiment. In their assessment, the first finding concluded that the obedient subjects (the sample taken from the original study’s Proximity Series) scored significantly higher numbers on the California F-Scale personality test on authoritarianism submission, as uncritical attitude toward idealized moral authorities of the in-group (Blass, 1991, p. 402). While obedient subjects scored generally higher on the F-Scale, it could not be concluded that an authoritarian personality alone would be the only explanation for the obedience (Blass, 1991). During their investigation, Milgram and Elms also used the Minnesota Multiphasic Personality Inventory (MMPI) (based on Hathaway & McKinley, 1951) to assess various personality traits. In the MMPI, those 40 (out of the total of 160) disobedient subjects scored significantly higher on the social responsibility scale.



broad personality differences which relate to obedience or defiance in the experimental obedience situation; but they do not reveal a single personality pattern, as for example the 'authoritarian personality' which is inevitably expressed in one behaviour or the other" (Elms and Milgram 1966, p. 288). Remarkably, while obedient and defiant subjects did not ascribe different levels of responsibility to the experimenter, they did ascribe different levels of responsibility to the learner, according to Schurz (1985). Schurz wanted to empirically demonstrate the relationship between personality characteristics. In her conclusion, she stated that "No significant personality differences existed between obedient and disobedient subjects" (1985, p.167). Yet, in her research, those subjects who had at some point disobeyed were more willing to accept responsibility for their behaviour than those who obeyed until the end of the experiment, a finding that was confirmed in the Austrian replication of the experiment (Schurz, 1985). Obedient subjects were much less likely to blame the learner (they ascribed twice as much responsibility to the victims) than defiant subjects.

Blass (1991) revisited the Milgram studies and its numerous replications to (among other aims) identify dispositional factors that impact on behaviour, even if they were not particularly stable and at times even contradictory. Before conducting his analysis, he argued that it is extremely difficult to pinpoint personality differences in individuals in psychological experiments (Blass, 1991, p. 402). Blass confirmed some findings on authoritarianism versus social responsibility, concluding that obedient subjects were more authoritarian, while disobedient subjects scored higher on social responsibility (*ibid.*, p. 403).

Are disobedient subjects more moral than their obedient counterparts? As part of the socialisation process, children must learn to become independent moral agents. How this development of moral cognition takes place in practice has been studied by developmental psychologists, such as Piaget and Kohlberg (Kohlberg & Hersh, 1977). This approach helps explain why people obey on a micro level, purporting that it is people's own ideas about the world (what is right and wrong and good or bad) that ultimately motivates their obedience or disobedience. In Kohlberg's theory, children go through stages of moral development: children and youth attain moral reasoning and come to understand what behaviour is right and wrong. In the early, pre-conventional phases, "knowledge" about behaviour is solely based on gaining external approval or avoiding punishment. More specifically, the child learns that obedience will result in being loved, mothered, or appreciated, while disobedience, or not listening, results in various forms of punishment: time-out, parental verbal outbreaks of displeasure, removal of valued items and physical punishments.

In the proceeding conventional phase, the individual develops advanced cognitions and conceptions of what social norms are, and comes to agree with them, or, at the very least, understand their existence. Obedient behaviour is displayed because the child or teen may be able to relate to principles. Kant's golden rule is an example of this: "Do unto others as you would have them do unto you" (M. G. Singer, 1963). In other words, at this stage they come to understand that obeying laws and authority figures is necessary. In the last phase, the post-conventional phase, individuals (at least those who reach those stages in their cognitive

development) come to comprehend social contract theory (and have nuanced views on the consequences of right and wrong actions) and even adjust their behaviour to universal ethical values. It is important to keep in mind that not every individual who understands what actions are right and wrong necessarily behaves accordingly. One might suspect that persons who reach a higher level of moral development may - as a result - also score higher on social responsibility. Returning to our earlier example: an adult pedestrian may take several courses of action when standing at a red traffic light. He knows that he is not meant to cross, because the law says so, and because he would be punished if a police officer caught him. Yet, he may also be cognisant of the fact that a child may see him and mimic this bad behaviour. Alternatively, he may think that it is simply wrong to disobey a traffic law and, as such, does not cross the road purely out of principle. He may also merely think it would be safer to wait.

Haslam and Reicher argue that social identity theory better explains people's conformity and obedience to malevolent instructions and roles (Haslam & Reicher, 2012). The scholars argue that the outcomes of Milgram's landmark studies are mistaken: rather than showing that people blindly succumb to authority, the scholars posit that the research instead demonstrated that subjects knowingly obeyed and that they had made a choice to obey after having identified with the professor and a scientific study (2012, p.3). The explanations, in particular the role of self-identity and the cognitive mechanisms that have been presented in section 2.2.2 apply to people deciding to carry out specific demands. Burley and McGuinness argue that disobedience is more likely linked to cognitive abilities, rather than personality traits (Burley & McGuinness, 1977).<sup>122</sup>

To summarise, in all cases it is safe to say that the interaction between personal and situational factors is the best predictor of obedience to authority.<sup>123</sup> A first finding was that obedient people tend to be more authoritarian, while defiant people place more responsibility on their own actions. Yet, the lack of one single personality pattern, however, is perfectly logical, in that personality psychology has largely moved away from assigning personality traits to behaviour towards an interactionist approach, which stresses that while individuals have certain dispositions that are reinforced by the environment (external triggers), the individual may also choose to enter certain situations and avoid others. Experiences further shape individuals' cognitions and future actions. Explanations for the behaviour of people in the experiments as well as the theory of identification also extend to explaining the behaviour of soldiers, who have not only been trained to obey superior orders but who, as will be discussed in Chapter Three, assume a new identity and are indoctrinated to relate to the institution.

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<sup>122</sup> People's cognitive abilities include people's beliefs about authority, whether people's (locus) of control lies is internal or external (based on Rotter 1966), and can be impacted by people's religious beliefs (based on Bock's dissertation)(Blass, 1991).

<sup>123</sup> Scholars argue that the dynamics of the social interaction between the subject and the experimenter are different in each situation, i.e. the exact choice of words and responses, along with the tone of voice and the clash of personalities can never be entirely matched (Collins and Brief, 1995). Even though general external "conditions" were controlled for, this was not the case for social interaction, because the same answer (reinforcement) may have had very different results/perceptions for the person obeying or defying.

### 2.3.3. Disobedience to authority in the Milgram experiments

What can be learned about disobedience from the Milgram experiments that help better understand why people were able to (successfully) defy the demands made by the authority figure? Darley suggests that Milgram's study possibly demonstrates the beginning of a path that real life perpetrators take (Darley, 1995, p. 134). The present section will first offer some explanations for disobedience before linking the theory with four cases from the Milgram studies.

The experimental setting of Experiment 5 was referred to as the baseline condition: the learner was not visible in the adjacent room but his screams could be heard, and at 150 volts the learner demanded to be released due to his heart condition. This 150 volts mark represents a significant turning point, or possibly a "wake-up call", as most people in all variations of the experiment disobeyed before or after the learner requested to be released by stating "get me out of here, I refuse to continue, I have heart problems, my heart starts to bother me" (Milgram, 1974, p. 25; Packer, 2008).<sup>124</sup>

Modigliani and Rochat (1995) found that the earlier the subject began to object, the greater the likelihood that he would disobey at some point during the experiment. By resisting the authority at an early stage of the proceedings, some subjects managed to break the momentum and gave themselves time and reason to search for a justification to stop. In other words, the lower the voltage at which a subject first raised concerns, the lower the voltage was at the point they refused to go on (Modigliani & Rochat, 1995, p. 117). Modigliani and Rochat's study also utilised an interactionist approach to explain subjects' behaviour, concluding that the difference between obedience and deviance cannot be ascribed to personal dispositions, but, rather, are the outcome of processes of social interaction between the subject and the "professor". An analysis of the interaction between the "learner" and the "professor" in one condition revealed that disobedience came down to three reasons, (1) one should not imply one's will and hurt someone (the learner asked for the experiment to stop), (2) subjects were worried about legal responsibilities for the consequences, and (3) some emphasized their free will and choice to discontinue (Rochat & Modigliani, 1995, pp. 208-209).

Milgram did not elaborate on his subjects' attempts to defy, to delay, to help the learner by stressing the correct answer, by questioning the experiment, or by pressing the lever very gently (Perry, 2012). According to a reassessment of one experimental setting, 24 % of the subjects displayed indirect non-compliance at some point (Bègue, Duke, Coubet, & Oberlé, 2017, p. 34). Gibson found that Milgram's subjects who defied the experimenter successfully made a rational choice, rather than a moral one, based on their perception of knowledge (Gibson, 2014).<sup>125</sup> Perceived knowledge can be based on experience, (lack of) factual

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<sup>124</sup> This has been confirmed by Packer in a meta-analysis of the Milgram experiments: the disobedience rate was significantly higher at the 150 volts mark than at any other point in all of the 23 experimental designs.

<sup>125</sup> Gibson conducted a rhetorical and discourse analysis, and found that the (successful) defiant subjects engaged in a dialogue over the experiment and stressed their own knowledge, or lack thereof (Gibson, 2014, pp. 429-430).

knowledge or conviction, and can coincide with people's confidence in their ability to defy an authority. This explanation can be compared to what Asch referred to "independent" subjects.

In her attempt to find mechanisms for disobedience, Schurz found in her post-experimental questionnaire that neither the general "weltanschauung" nor subjects' self-descriptions were adequate explanations for disobedience (Schurz, 1985, p. 174). Consequently, people who voluntarily participate may already be biased because they value science/accredit the experimenter with authority. In the subsequent paragraphs, four defiant subjects from the Milgram studies will be introduced to examine individual differences and possible life experiences as explanations for their disobedience.

Joe Dimow published a short summary of his experience in 2004 (Dimow, 2004).<sup>126</sup> Dimow was a family father in his forties working in a work-shop, when he took part in the experiments in 1961 (Perry, 2012, pp. 126-127). Dimow stated that he was suspicious and that he could see through the cover story, because (1) he never saw the straws the "learner" drew, (2) because the learner had no questions despite being the one who was shocked and (3) because the "professor" observed Dimow, rather than the "learner" (Dimow, 2004). In addition, he believed that it was already common knowledge that punishment did not support learning, and thought that the learner's cries were fake. After the learner asked to stop the experiment, Dimow refused to go any further (Dimow, 2004).<sup>127</sup> Dimow himself explained that he was not only raised to differentiate between different types of authority ("I was not likely to be impressed by a white lab coat"), but he also exercised authority himself, as he acted as chairman of the Communist Party in New Haven (Dimow, 2004). Furthermore, as an active member of the Communist Party, Dimow was harassed by the FBI during the McCarthy era, arrested and convicted but won his case on the appeal (ibid.) Dimow himself stated: "I belief these experiences also enabled me to stand up to an authoritative *professor*" (ibid.). Dimow also did not mind standing out, having lived as only Jewish family in a predominantly African American neighbourhood, and speaking freely about his political opinion. Two crucial explanations are immediately applicable to Dimow, he made his decisions "independently", and did not perceive the "professor" as authority. He felt confident in his knowledge that he did not have to do what he was told.

Jan Rensaleer was a thirty-two-year-old industrial engineer, who emigrated from the Netherlands after World War II. He refused at 225 volts (Milgram, 1974, p. 53). He assumed responsibility for administering the shocks retrospectively, concluding that he should have stopped at the first complaint from the learner (ibid.). He explained that after what he had

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<sup>126</sup> Due to hindsight bias, it is possible that Dimow's own retrospection of what he perceived and knew at the time have been impacted by the inside he gained after he had taken part in the experiments: he read Milgram's book and used the jargon of the literature.

<sup>127</sup> Whether subjects believe that someone else is really being shocked was discussed by Orne and Holland in terms of its internal validity. Yet, recent replicas use virtual reality to test obedience and even though subjects are aware that they do not harm another person, they experience discomfort and are also reluctant to defy (Miller et al., 1995; Orne & Holland, 1968).

experienced in Nazi-occupied Europe, he would have expected to display a higher level of compliance to orders (ibid.). This is because Rensaleer probably saw many ordinary civilians transform into perpetrators and obey illegal orders.

One crucial statement from his argument with the “professor” was that he, as an electrical engineer, claimed he knew what such shocks do to people (especially the fear of knowing that another one is coming) (ibid., p. 52). Rensaleer subsequently referred to the fact that he took part in the experiment out of his own free will and that they had gone too far already.<sup>128</sup> His defiance of authority can be explained, in part, by his inability to deny the harm that he was supposedly administering and his unwillingness to shift the responsibility on to the experimenter. His professional knowledge imbued him with the self-esteem to rely on his own expertise. In addition to his expertise, the subject had experienced living next to an illegitimate real-life authority, in neighbouring Nazi Germany, which may have caused him to see that he had options to refuse the commands. Aside from the fact that in his case at least two motivations kept him from obeying, we cannot determine precisely how these led him to disobey.

A “professor of Old Testament” (sic) (Experiment 3) refused to take orders from the experimenter, stating that they were in America and not in Russia (Milgram, 1974, p. 49). His cognitive ability to refer to constitutional rights, shows that he holds fundamental moral norms to be superior to the immediate commands from the experimenter. He may not have perceived the experimenter as an authority, because of his own position as a professor, specifically a professor of religious education. In a follow-up discussion, the professor brought up the learner and his physical and mental state, possibly because of his religious educational role (ibid., p.50). Here, the social hierarchy probably failed to lead to obedience.

Gretchen Brandt was a thirty-one-year old medical technician, who had emigrated from Germany. Whilst she appeared calm and controlled, like Rensaleer she repeatedly emphasised that she and the learner had signed up for the experiment out of their own free will and that they also had the choice to leave if they so wished (Milgram, 1974, p. 87). Ms Brandt terminated the experiment at 210 volts and explained later that she did not want to be responsible for inflicting harm on the learner. When interviewed about the possible connection to her background growing up in Nazi Germany, she stated that “perhaps they had seen too much pain” (Milgram 1974, p. 88). One could also argue that she had direct experience of seeing that those who followed orders from authorities were held responsible at the Nuremberg Trials. Consequently, her personal experience with a coercive authority may have diminished the influence that the experimenter had on her.

Personal experiences, knowledge, and cognitive abilities can help explain disobedience, cognitive defence mechanisms are crucial for understanding how normal people in the Milgram experiments found themselves unable to refuse, as well as for explaining how they dealt with the consequences of continuing the experiment. Soldiers in real life also use such

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<sup>128</sup> Interestingly, Rensaleer became so interested in the experiment that he asked to become involved.

coping strategies to deal with their daily tasks and experiences, as will be explained in the subsequent chapter. This raises the possibility to explain disobedience due to the lack of engagement of unconscious defence mechanisms.

## **Conclusion**

The present chapter examined extant knowledge on the psychological dimension of nonconformity and disobedience to unjust demands. It considered both external and internal factors that may impact upon people. The first important lesson stemming from the chapter is that people are social beings and receptive to influences from surrounding groups, and, moreover, that people tend to carry out demands from authority figures. Through recourse to experiments that studied manifold situational factors, it can be concluded that there are significant moderators that impact upon subjects' behaviour, which, in turn, casts light on the nature of human behaviour. Subsequent experimental replications and variations demonstrated that specific situational factors impact upon the rate of conformity and obedience. For example, if the group comprised three or more people, then individuals were more likely to yield than if there were only one or two opposing subjects. Further, when subjects were cognisant of the fact that they would have to justify their choices and behaviour later, they were also more likely to act in a nonconform fashion.

Theoretically speaking, some preliminary conclusions that can be drawn regarding the understanding of why soldiers do not conform to the group could be that soldiers are more likely to act in a nonconform manner when they are surrounded by other resistant individuals, if they are leaders or outsiders, or if they know that they will be held accountable later. The most decisive factor in determining conformity appears to centre on the self-image or level of self-esteem of the person. The self-esteem and self-identity of soldiers in the military is a central discussion point of the next chapter.

From the obedience to authority experiments, it can thus be understood that the physical absence of the authority figure constituted an important factor in increasing disobedience. Indeed, obedience dropped dramatically when orders were given over the telephone. One crucial situational finding was that subjects were more likely to feel empowered to disobey if others did so. This could be a useful variable for analysing soldiers: if other comrades disobey, then one's own ability to disobey may also increase. The proximity of the victim and the visibility of the harm also appeared to make a difference, especially when the distance between the actual administration of the shock and the subject was increased.

The chapter also provided insight into the individual traits that have been associated with either increasing or decreasing disobedience. While, historically speaking, personality factors were predominantly considered in terms of personality or dispositional traits only, today, scholars in the field tend to also include personal experiences and cognitions. Dispositional traits, such as authoritarianism, have not proven to be particularly expedient for explaining

obedience or conformity. Rather, dynamic cognitive processes and perceptions regarding, for example, one's responsibility towards others has been shown to better account for the behaviour subjects displayed in the experiments. People can have different motivations to conform to a group (despite personal objections) and/or to go along with unjust demands from an authority. These include gaining social rewards or avoiding social punishments, affiliation with a person or internalising behaviour. These levels are important, in that they account for the intensity and duration of the behaviour. Hence, a soldier, who has internalised that killing is a good thing, acts very differently from a soldier who only kills because he does not want to be punished.

Consequently, an individual's self-identity and perceptions about who they are directly affect a person's decision to disobey an experimenter, due to their idiosyncratic experiences or a person's unwillingness to shift responsibility for the consequences of their actions onto the experimenter. In conformity situations, an individual's high self-esteem may account for nonconformity or independence. This is because the individual may have such strong cognitions about what is right and wrong that they do not succumb to the group's norm. Whether the individual mimics the behaviour of others can also be task-specific self-perception. A person who has little experience with the requested behaviour may thus be more likely to accept the group's interpretation of what is the correct form of behaviour. A further criterion that impacts upon conformity is the individual's role or function in the group: leaders and disliked group members have more leeway to act in a nonconform fashion. Accordingly, a senior soldier, or a group leader who takes decisions for subordinates, may feel more responsible to act upon their duty to disobey. Within military units, there may be a marked difference between individuals pertaining to the extent to which they seek approval from their superior or comrades, or the extent to which they do not care. Soldiers who are outsiders, for example, may feel freer to risk breaking with the chain of command.

For all individuals, the commitment to follow one course of action over another can lead them to continue on that same path, regardless of whether it is a disobedient, obedient, nonconform or conform action. The cognitive need for consistency and the normative public ideal not to lose face can lead to people finding themselves locked into their chosen path. This can be especially detrimental if the situation gradually becomes worse, if the individual has gone too far and there appears to be no way out. In such cases, the individual is likely to employ defence mechanisms that make the cognitions about what they are doing more bearable, such as rationalisation or denial. Simply put, if subjects decided to speak up early on in the process, then they were significantly more likely to refuse, while those who did not speak up at all were more likely not to refuse at any point. If the military institution is indeed interested in encouraging soldiers to act upon their duty to disobey, then the self-image of a soldier who does not go along with perpetrating crimes, and who indeed refuses to obey orders to commit crimes, should be promoted accordingly. However, it is questionable to what extent this is the case in practice. The institutional dimension of soldiers' dilemmas and how this affects members of the military's ability to act on conscientious disobedience constitutes the central theme of the next chapter.

# **CHAPTER THREE**

## **The Individual in the Military**



## Introduction

“The pressure is so strong that beyond the group, right and wrong lose their meaning. Only the group matters- until it’s just too much and things come out on the outside. Like with Somalia. If it hadn’t come out from the outside, it probably never would have come” (Canadian Soldier cited in (Winslow, 1999a, p. 12). Here, the Canadian soldier is referring to the torture and murder of a 16-year-old Somali boy by Canadian forces who were in Somalia on a United Nations mission in 1993 (Gordon, 1993, p. 546). The soldier’s statement underscores several crucial social forces that impact upon most military personnel. For example, right and wrong are redefined to a certain degree, as the group comes to mean more than anything else, there is a marked *inside-outside* distinction, and people on the inside prefer not to share their failures with the outside.

Soldiers are embedded in the military institution, an environment separated from the rest of society, in which the individual undergoes training to become a member and in which the individual is exposed to numerous particular environmental and social forces. The previous chapter dealt with nonconformity and disobedience in general, as well as respective underlying psychological mechanisms that impact upon individuals who are – or are not - adjusting their behaviour to that required by the group or the authority. The present chapter will zoom in on how the social forces and cognitive mechanisms apply to the military environment, and how these factors can further influence obedient or disobedient behaviour of the individual soldier. The theoretical framework of conscientious disobedience needs to take into account how the individual soldier may be influenced by his membership in a military institution to better understand and explain his disobedience.

The military can be compared to a guard dog that parents procure in order to protect their family and their home. The dog’s function is to be aggressive towards intruders and thus serve as a deterrent for criminals. In the same vein, the presence of a strong and effective military should also function as a deterrent that keeps other armies out of the state’s territory, as well as being able to attack or counter-attack in the case of an emergency. Neither the guard dog nor a national army should attack their own family or nation, and both must be properly trained and contained to ensure their effectiveness: the guard dog sleeps in the dog house while military personnel reside on military bases.<sup>129</sup> One must add to this analogy that the inculcation of obedience pertaining to both, the case of the military and the dog analogy, constitutes the determining factor in terms of keeping aggression under control.

With its unique mandate to protect the state, the military is an institution that demands more from its members than other workplaces do, which is why the armed forces constitute what

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<sup>129</sup> This is different if the family gets a cuddly golden retriever who sleeps inside the house: such a dog would be a cosy pet for the family, but ultimately not as effective in deterring as a bull terrier.

is referred to as total or greedy institutions (Soeters et al., 2003).<sup>130</sup> For Winslow, the study of military institutional culture not only provides a better understanding of individuals within the organisation, it also opens up fresh perspectives and new avenues of inquiry, which, in turn, contributes to a more informed debate about soldiers (Winslow, 2000, p. 5). The previous chapters started building the theoretical framework to study soldiers who disobey illegal orders by studying the legal duty to disobey illegal orders in Chapter One and by illustrating psychological dimensions of disobedience and nonconformity in Chapter Two. This chapter, which examines how the military environment impacts upon a soldiers' dilemma when having received an illegal order, is pertinent for understanding additional factors that are likely to influence the soldier's subsequent decision to break the chain of command.

Several cognitive mechanisms were already introduced in the previous chapter in the context of disobedience and nonconformity in socio-psychological experiments. In the present chapter, some of these mechanisms are re-examined in the context of illegal orders within military institutions and those factors that impact on soldiers' decision to take part in – or refuse to take part in – inhumanities. First, making use of theoretical insights by Kelman (1973) and Bandura (1999),<sup>131</sup> section 3.1 explains how moral disengagement mechanisms enable soldiers to take part in inhumanities, particularly focussing on the authorisation of violence, the routinisation of violence and the de-humanisation of victims. These moderators constitute a pertinent element in the theoretical framework as they account for obedience and conformity of soldiers who commit crimes. Accordingly, the argument is made that the absence of factors that normally help people overcome inhibitions to hurt others impacts disobedience and nonconformity in soldiers.

Next, section 3.2 introduces the military as an institution in order to allow for a better understanding of how the military profession<sup>132</sup> differs from other establishments, and, above all, how the individual soldier is affected by being a member of the demanding institution (Soeters et al., 2003). The institutional environment defines physical and mental boundaries for actions that soldiers take and legally requires obedience to orders, as discussed in Chapter One. The ways in which military culture can affect individual soldiers is then considered.

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<sup>130</sup> While each army, branch, and unit has its own particular identity, the process of becoming a member of a group in the armed forces is comparable in most instances because it aims at the transformation from being a civilian to being a soldier (Holmes, 1985, p. 28).

<sup>131</sup> Bandura's theory of "moral disengagement in the perpetration of inhumanities" (1999) and Kelman and Hamilton's "crimes of obedience" have been used extensively to explain why soldiers perpetrate crimes (Bradley, 2011; Doris & Murphy, 2007; Smeulders, 2008, 2011; Talbert & Wolfendale, 2019; Tripodi, 2011a, 2011b; Wolfendale, 2007).

<sup>132</sup> Wolfendale summarises profession as such: "A profession serves an important human good necessary for a flourishing human life. Professionals are required to undertake a high level of training and are expected to exercise significant autonomy in their work. A profession, by virtue of the importance of the service it provides, has a monopoly on the provision of that service and is subject to internal checks and balances, usually through a code of practice and/or licensing boards, regulatory bodies, or associations of professional members. Finally professionals are expected to display more than technical competence; they are also expected to maintain a high moral character and to use their skills wisely – to exercise reflective moral judgement in carrying out their roles" (Wolfendale, 2007, pp. 9-10).

Simply put, culture can be understood as a shared outlook, norms and values, ideas, sets of meanings and symbols (Soeters et al., 2003). Military culture is strongly informed by the institution's function of ensuring the security of the state, which is why obedience is institutionalised and conformity is enforced (Finer, 1962, p. 6).

The desired impact of traditional<sup>133</sup> military training is subsequently discussed in section 3.3. In order to ensure that individuals obey orders and conform to rules, military training is specifically aimed at overriding the individual's own norms and values with those of the military, as well as making his response to these orders reflexive (Wolfendale, 2007) and creating a new self-image for the soldier which stresses his belonging to the group. Military training is thus intended to minimise soldiers' moral agency in lieu of the group-norm, which can strongly affect their ability to decide on how to respond to an illegal order. Military training also specifically aims to create strong group bonds in preparation for the cohesion that is required in combat (Siebold, 2007). As example, the chapter illustrates the transformation of recruits in the U.S. Marine Corps.

Finally, section 3.4 discusses how the battlefield (or a more contemporary term may be "battle-space") can further impact upon soldiers' moral decision-making. Numerous stress factors influence individuals differently, which, in turn, impacts on soldiers' perceptions of their options. For example, the classic notion of the fog of war illustrates how military personnel operate in an extremely dynamic, high-risk and stressful situation.

### **3.1. The perpetration of war crimes and other inhumanities**

Manifold socio-cognitive mechanisms can contribute to the perpetration of war crimes and other inhumanities. Kelman (1973) classified three processes that weaken moral restraints against violence in all people: authorisation, routinisation, and de-humanisation (Kelman, 1973, p. 38). Bandura further distinguished between those mechanisms that enabled individuals to perpetrate inhumanities by morally disengaging from the acts they were carrying out (Bandura, 1999, p. 193). Moral agency, according to Bandura, is embedded in people's broader socio-cognitive self-theory, comprising self-organising, proactive, self-reflective, and self-regulatory mechanisms, which are linked to self-sanctions (ibid.). These mechanisms must be activated, or in the case of perpetrating inhumanities, be selectively switched off or disengaged from.

Moral disengagement mechanisms encompass the cognitive restructuring of inhumane conduct into a benign or worthy one via an array of techniques: moral justification; (re-)labelling – that is, use of euphemisms or sanitizing language; advantageous comparison –

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<sup>133</sup> A traditional (or modern) military institution is designed to combat a nation state. As will be discussed below, some post-modern military institutions place more emphasis on the capabilities of their personnel to deal with challenging and unpredictable situations (which are common in post-modern conflict) and encompass specific moral decision-making training (Wortel & Bosch, 2011).

self- or group image enhancement; reducing one's own personal agency by diffusion or displacement of responsibility, disregarding or minimizing the harmful effects of one's inhuman actions; the attribution of blame to victims, as well as the de-humanization of the victims (*ibid.*). Furthermore, these inhumanities are often legitimised or condoned by authorities, or constitute what Kelman and Hamilton (1989) coined crimes of obedience, while responsibilities tend to be subdivided and diffused.

There is more to moral agency than the cognitive abilities discussed in the previous chapter pertaining to moral development and reasoning (Kohlberg & Hersh, 1977), which is that the person becomes an agent of their cognitions, and takes action in accordance with self-regulatory mechanisms and self-sanctions of the moral self (Bandura, 1999, p. 193). Moral competence can be understood as the ability to assess a given situation, taking into account the various impacts of different courses of action, conducting a reasonable analysis and being willing to act on the analysis (Wortel & Bosch, 2011, p. 17).

Whilst the moral disengagement mechanisms deployed by individuals who perpetrate inhumanities enable them to commit crimes of obedience, it has been argued that those soldiers who conscientiously refuse to take part in inhumanities fail to disengage from moral self-regulation (Bandura, 1999, p. 203). In other words, they retain their moral compass while other members of their unit alter their cognitive perception of the inhumanities they perpetrate. However, Bandura acknowledged that the individual moral agent does not act in a social vacuum, and, consequently, that a socio-cognitive theory of moral actions must consider the situation from an interactionist perspective (Bandura, 1999, p. 207). Accordingly, the subsequent sections provide a situationist perspective on how the military institution impacts on the self-regulation and moral self of individual soldiers.

### **3.2. Military institutions**

The following section introduces general institutional elements of the military, before proceeding to examine how they impact upon the individuals working for the institution. The armed services, as well as their respective reserve and guard forces, ordinarily include an army, which is primarily responsible for land warfare, a navy, which maintains ships like aircraft carriers and aircrafts, and a marine corps, which is an autonomous assault force and a subsection of the navy, with its own air and landing craft. Evidently, the primary function of the air force concerns air warfare and support. As aforementioned, the military is authorised to use (legitimate) violence against people. Military operations comprise a highly complex division of labour (both between and within services) and rank (from generals to army privates). Moreover, most of the branches have additional specialised task forces, such as the U.S. Army Green Berets or Navy Seals. Each of these branches is led by an independent command structure, and fosters a unique culture, which becomes part of the soldier's self- and group identity. Yet, all members of the armed forces share the fact that they are one small element of a large bureaucratic organisation, which is responsible for the

execution of national security tasks. This bureaucratisation and highly specified division of labour can contribute towards soldiers' inability to grasp the full consequences of the operations they are engaged in; Bandura (1999) referred to this process as bureaucratisation and division of labour, while Milgram referred to it as tuning when a subject focused on only a relatively small aspect of what was being done to someone.

In many countries, the military constitutes the biggest bureaucratic organisation. For example, the U.S. Military currently employs around 2,2 million of which are 1,4 million service members on active duty, compared to 265.000 members (military and civil) of the Bundeswehr of the Federal Republic of Germany.<sup>134</sup> It is important to note that the military is not the only institution that is granted the use of force: while the military force is tasked to defend and protect the interests of the state mainly from external threats, the police force maintains law and order within the state.<sup>135</sup> One crucial difference between the military and police forces pertains to the use of maximum force that the military applies and the rules of minimal force that the police use to keep society safe. However, when a "state of emergency" is invoked, the military will also get involved in domestic affairs, such as providing disaster relief, or combatting terrorism within the state, as was the case with Latin American Juntas or South Africa's suppression of the ANC during the Apartheid era. It has been argued that the military and police tasks increasingly converse and that role shifts between the two professions frequently occur (Campbell & Campbell, 2009, p. 327). In democratic regimes, the government uses legitimate force or aggression, that is, the government seeks consensus (and sometimes even approval by its people) before sending troops into operations. By contrast, authoritarian regimes neither have to seek to develop a consensus nor justify the deployment of the military.

This section discusses three broad institutional features that can have significant impact on soldiers' self- and group identity and contribute to their cognitions regarding their environment. These features that are expedient for understanding behaviour outside of experimental settings.

First, contrary to other employers, the military institution not only governs the work life of their employees, but also their social life. This is why it can be considered as a so called total institution. Second, military institutions foster their own culture, which impacts upon members' perception of what constitutes normal conduct and produces specific self-images. As Hartle observed, "military obedience remains a central feature of military conduct and professional performance of those in uniform" (Hartle, 2002, p. 65). Third, institutional evolution also impacts upon its members; for example, both how the military changes over time and how the historical context impacts upon the institution and the individual is of critical relevance for understanding a soldier who has been given an illegal order. Time and

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<sup>134</sup> Retrieved from websites: [global.firepower.com](http://global.firepower.com) and [Bundeswehr.de](http://Bundeswehr.de).

<sup>135</sup> The police force is relevant here, both because they are a militarised unit and because East German Border Guards were also in the police force at some point.

context are especially pertinent in terms of defining what constitutes a national threat, which, in turn, involves the identification of an enemy. Such enemies are invariably labelled in dismissive terms, such as the Nazi party's frequent discursive construction of Jews and other undesirables as rats or sub-humans, so that discriminative and later genocidal policies in Germany were more morally "*acceptable*" (Kelman & Hamilton, 1989, p. 19). In so doing, the Nazi regime propagated a de-humanised and demonised image of the enemy and, through a highly complex division of labour, was able to invoke mechanisms that authorised violence against this "enemy". By disguising genocidal policies in euphemisms people could better rationalise their inhumane and criminal behaviour while maintaining a positive self-image. The subsequent section examines the military as an institution that protects a nation against threats.

### **3.2.1. Total institutions**

In order to fulfil their task of ensuring state security, the military must be both highly organised and hierarchical to avoid abusing their monopoly over the use of lethal force (Keijzer, 1977, p. 32). According to Lang, discipline is thus a necessary behavioural control mechanism, cited in Soeters (Soeters et al., 2003, p. 243). Control over members is sought by prescribing and supervising every aspect of their lives, which is why the military has been designated as a total institution. According to Goffman, "a total institution may be defined as a place of residence and work where a large number of like-situated individuals cut-off from the wider society for an appreciable period of time together lead an enclosed formally administered round of life" (Goffman, 1961, p. 11). In most societies, people work and live within separate locations: one is the work-space, the other one includes private space and public spaces for leisure time. In total institutions, all these respective spheres are combined under the same authority within shared locations. In cases where service members live on military compounds or during periods of active deployment, they are detached even further from ordinary civilian institutions and civil modes of life, and instead create new frames of reference and new norms.

As Goffman stressed, the military is cut-off from normal society. This delimitation necessitates strong internal organisation and self-sufficiency (Finer, 1962, p. 7; Soeters et al., 2003, p. 242). Military areas are not only ordinarily physically distant from civil society, garrisons are also fenced off and only accessible via a checkpoint. This serves to keep civilians out and keep military personnel in, while, simultaneously, minimising the exchanges or interactions between civilians and military personnel. Within military compounds, one usually finds an infrastructure comparable to that in civil society, from convenience stores to medical centres or military police stations (Rosati, 2004, p. 162).

As discussed in Chapter One, the U.S. military institution, like many other armies, created separate laws and norms that are applicable to its members and that are enforced by the military police and military court system, which ensures that the organisation can "solve its

own problems” without relying on the civil system. This self-sufficiency leads to a lack of civilian oversight in traditional military institutions. In the military, different laws and regulations, as well as different norms, thus guide the behaviour of its members.

Due to the specific purpose of the organisation, the military does not tolerate any deviation from existing laws, regulations, and norms from its members. As Huntington notes, members of the military must be loyal and obedient (Ceulemans & van Damme, 2002, p. 7; Huntington, 1967). Superiors (try to) ensure absolute obedience and conformity via a process of indoctrination and training and administering stringent punishments for disobedience. At the same time, superiors also bear responsibility for their subordinates and the conduct of subordinates, which is embedded in officers’ command responsibility, see Chapter One. Any behaviour that is not accepted in the group will have negative consequences, such as in the form of a social penalty, for example having to clean the toilets or having one’s permission to go on leave revoked. This testifies to how the military is buttressed by a harsh punishment and reward system.

The institutional infrastructure of the military transforms the entire environment of the individual. He or she becomes part of something that is, literally, larger than life. Related to this, one crucial point of difference from other institutions is that an individual’s life can be sacrificed for the overall mission. For the individual, being a member of the armed forces means adopting a new frame of reference. The military frame of reference offers orientation, influence, guidance, as well as steering individual decision-making (Neitzel & Welzer, 2012, pp. 7-8).

In the military, the individual enters a social relationship, or set of bonds, with the institution, organisation (unit), superiors and their peers (Siebold, 2007, p. 288). The way reality is perceived and constructed ultimately affects how individuals interpret their freedom to act: as a member of an individualistic society there is a broader scope to decide upon one’s course of action, while within an institution that highly values and enforces conformity and obedience, individuals are clearly restricted in their range of options.<sup>136</sup>

The military frame of reference or identity, which will be elaborated on in in section 3.3, has a profound influence on those working for the armed forces, because they are completely surrounded and embedded in the military institution. Indeed, an individual’s entire life is prescribed, ranging from when to get up in the morning to where and when they can relax. Given that there is no recourse to civilian institutions, the influence of the military institution becomes greater than any other civilian work environments, due, in part, to the strength of the military culture.

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<sup>136</sup> This difference has been explained in Chapter One: in the U.S., the legal obligation and option to disobey (manifestly) illegal orders is significantly more limited than in Germany, where soldiers have the freedom to disobey if they have conscientious reservations.

### 3.2.2. Military culture

As above defined, culture refers to a “way of life” and constitutes either a group phenomenon, or a collective mode of programming in which the group mind-set is distinguished from that of other groups. It includes a collective outlook, shared norms and values, ideas and sets of meanings and symbols, which evolve over time and derive from the respective environment (Soeters et al., 2003, p. 238). Culture, then, can be said to prescribe how people perceive they should behave or think about life, and, in the military context, can encompass values such as honour or loyalty. In Western cultures, individuals tend to strive towards self-realisation, whereby each individual is primarily responsible for their well-being and happiness, while in more “collective” cultures the well-being of other members of society forms an integral part of one’s daily culture and self-identity (Hazel, 1991). For example, “individuals seek to maintain their independence from others by attending to the self and by discovering and expressing their unique inner attributes” in American culture, while in Japan, “the emphasis is on attending to others, fitting in, and harmonious interdependence with them.” (Cialdini et al., 1999). Especially in Western states, military culture thus marks a clear departure from how individuals value themselves and others.

It should be noted that (each) military culture is generally idiosyncratic, and dependent on the parent society, subdivisions, and how individual soldier’s impact upon the group. Therefore, while all servicemen and -women share a general identity as member of the military, a member of the Green Berets can be said to be embedded in a different culture than a drafted infantry man. Yet, certain aspects of military culture overlap and are universal. For example, formal conformity is institutionalised in the military: recruits are equipped with the same uniform, haircut, and are forced to leave all personal belongings behind, including their civilian attitude and values. All troops are grouped into certain units of regiments, battalions, companies, and platoons. During training, soldiers become accustomed to the stratification and bureaucracy that characterise the institution, while the respective sub-group they belong to comes to constitute a stronger source of group identity. Indeed, in Canada, for example, the three existing regiments are known to despise each other (Winslow, 1999a).

Robinson (2008) conducted a comparative study of military values in Israel, Australia, Canada, the U.S., Japan, Norway, Germany, France and the U.K.<sup>137</sup> His findings indicated that eight out of twelve states listed loyalty, comradeship and courage as part of their primary virtues (Robinson, 2009, p. 6).<sup>138</sup> Loyalty has been found to be of particular importance, with Winslow noting that “codes of silence” are invoked and that whistle-blowers are ostracized (Winslow, 2000, p. 34). Winslow observes that, on occasion, the informal culture and loyalty

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<sup>137</sup> Robinson (Robinson et al., 2008, p. 5) distinguishes between virtues and values: virtues represent desirable characteristics of individuals (such as courage), while values refer to ideals that the community cherishes (such as freedom). However, these two terms are often closely related and at times may overlap, which is why they are used interchangeably by some authors, including this author.

<sup>138</sup> An Finer (1962) listed the following as common overlapping military values: bravery, discipline, obedience, self-abnegation, poverty, patriotism, courage and fidelity (Finer, 1962, p. 10).



to other group members is more important than loyalty to one's country or the mission itself. Robinson also identified self-sacrifice and discipline as additional desirable values promoted across different armed forces (Robinson, 2009). Self-sacrifice is an obvious desirable requirement in the military, as soldiers are expected to give up their own life in the line of duty. Discipline, even discipline that goes beyond the formally required call of duty and adherence to rules, has also been recognised as a stereotypical feature of the military (Kirke, 2009).

The stratification of echelons identifiable by rank and insignia is necessary for the effective execution of operations and maintenance of a reliable division of labour. An extensive division of labour can contribute to a perception of diffusion of responsibility, soldiers only focus on the small task at hand but do not see what the overall mission includes (Bandura, 1999). The hierarchy and daily enforcement of obedience helps to ensure the prompt execution of orders, which is especially necessary in battle-spaces, or in so called "hot" situations.<sup>139</sup> Finer (1962) purports that discipline implies obedience: superiors expect orders to be followed promptly and precisely, without question. Discipline in the military comprises abiding to regulations and adhering to ceremonial discipline, such as salutes, and outward appearances, most notably, uniforms and functional discipline, as well as executing orders and generally acting in accordance with rules.

A further common feature of military culture is the existence of the *esprit de corps*, or comradeship. This brotherhood designates a common feeling of belongingness and is particularly pertinent for the martial purpose, whereby soldiers must be able to absolutely depend on each other and value their comrades' lives as being equally important to their own (Winslow, 1999b). The "organic solidarity" of the beliefs and sentiments that all troops adopt is the main source of their group identity. As alluded to in the previous chapter, the identification with a group can lead to feelings of superiority (Aronson, 2004).

As opposed to official values that can be found in military pamphlets, other aspects of military culture are manifested in the clear social division between superiors (officers) and lower ranking members, in particular enlisted soldiers. This division is integral to creating the necessary respect for superior officers, whose orders must be obeyed. Hence, officers must be regarded as authorities, and one way to achieve this is to make the officer corps distinctly superior to enlisted soldiers. This hierarchical division can be consolidated by physically separating enlisted soldiers from their officers. For example, in the U.S. Marine Corps, new recruits do not even see their officers eat, which would make officers seem more alike (Ricks, 2007).

According to Finer, above all, the military organisation requires a centralised command that oversees all missions and operations, so that the military can report back to civilian control

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<sup>139</sup> "Hot situations" can be labelled as *hot* because of the temperature of the "fire" but also because being in combat is "hot" and decisions have to be made quickly and efficiently.

and account for the use of force in the field (Finer, 1962, pp. 7-8). In democratic societies, the military is ultimately accountable to civilian leaders, such as the Minister or Secretary of Defense and the Prime Minister or the President, who in the U.S. is the Commander in Chief. In principle, the military is intended to be apolitical and to carry out orders from the government.<sup>140</sup> Yet, in cases of what Kelman calls sanctioned massacres, the civilian authorities are themselves involved in either authorising or condoning illegitimate violence. In non-democratic regimes, the military might report to an authoritarian leadership, or even constitute part of the leadership, such as in the case of a military junta. Resultantly, armed forces in non-democratic regimes are not bound to civil oversight or approval.

The function of the armed forces can be understood as protecting their parent society from threats. Obedience to superior officers is potentially the most important virtue in the military, hence why it is implicitly present in every aspect of soldiers' lives and explicitly demanded from soldiers via laws and regulations. Conformity is enforced through assimilation and group bonding. As has been alluded to in this chapter, the broader background in which an individual joins the military must also be taken into consideration, as well as how societal customs and dynamics impact upon the institution.

### **3.2.3. Modern, late-modern, and post-modern military institutions**

The specific function of the armed forces is subject to change. These changes are a consequence of the historical context and the respective leadership of the country. In most circumstances, the leadership comprises a government or dictator to which the military institution is ultimately accountable. The exception is military dictatorships when the military institution itself has gained absolute power through a coup d'état, often by over-throwing a civil leadership or monarchy, and is not accountable to other institutions. The leadership of the state decides when and what kind of (legitimate) violence is executed by the military, based upon the leaderships' perception of the threat (Finer, 1962; Huntington, 1967; Moskos, Williams, & Segal, 2000; Nuciari, 2003; van Bredow, 2003).

Moskos classified armies into modern, late-modern, and post-modern types (Moskos, 2000, p. 14). While all armies share the general function of ensuring security, there are nevertheless cross-country differences and changes across time. For example, the definition of the overall (perceived) threat impacts upon the structure of the armed forces, including their size, constitution and the policies that govern the conduct of war. Moreover, the armed forces can draft all healthy young men into its respective units, or contract specialist civilian employers, and may undergo socio-cultural changes, such as the inclusion of women or acceptance of homosexuals, as a result of shifts in public opinion (Nuciari, 2003, p. 67). Whether individual soldiers have been conscripted or joined voluntarily (as opposed to due to economic incentives) can make a profound difference with regards to the effectiveness of military

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<sup>140</sup> However, it has been argued that despite the theory, in practice, the military is conservative and in the United States stronger affiliated with the Republican Party (Wolfendale, 2007).

indoctrination; for example, a young person whose values do not align with traditional military values may be more likely to maintain their moral self than someone who holds the military in high regard.

The perceived threat in many modern armies (roughly encompassing the period 1900-1945)<sup>141</sup> centred on the invasion of the home territory (Moskos, 2000, p. 14). This major threat became less prevalent at the culmination of World War II, when the founding of the United Nations and the fortification of military alliances, such as NATO and the Warsaw Pact, increased each bloc's perception of security, safe perhaps those nations that hosted the Iron Curtain, like Germany. The divided Germany experienced the Cold War at first-hand inside its geographical boundaries, as will be discussed at length in Chapter Six. Modern armies were mass armies, which were mainly based on conscription and generally supported by the public. Women, if tolerated at all, were wholly separated from their male counterparts, while homosexuals were punished. The possibility of conscientiously objecting was either extremely limited or entirely prohibited. During World War I and World War II, most modern armies protected the security of their state, while other armies carried out their respective state's aggressive expansions, such as German, Japanese and Italian soldiers did.

For example, the Nazi leadership communicated to the public, from which Wehrmacht soldiers were recruited, that the Jewish population constituted a grave threat to the well-being of all Germans and therefore needed to be "fought". The Nazi rhetoric increasingly manifested itself in a new social reality, one in which Jewish people were gradually excluded from society, dispossessed, deported, and eventually murdered in their millions (Welzer & Christ, 2005, p. 49). The rhetoric as propagated by the media became part of the frame of reference of soldiers, to the extent that Neitzel and Welzer argued that people in the Third Reich became "national-socialised" (Neitzel & Welzer, 2012, p. 27). While the Jewish people were demonised, the German national self-esteem grew, the unemployment rate decreased and positive associations with the Führer were built. Due to the economic and perceived social progress that Hitler brought to Germany in the aftermath of the devastation and humiliation of losing World War I, being a soldier and fighting for the Wehrmacht, at least at the onset of World War II, represented a great honour for many Germans who were drafted into the Wehrmacht.

Throughout the late-modern period (the Cold War period from 1945-1990), members of military organisations supported their governments in curtailing the major threats of the time: (the spread) of communism or capitalism, respectively. Numerous proxy wars were fought between the power blocs during this period, whereby the superpowers did not directly fight each other, but rather supported warring parties. For example, the U.S. Army fought in Korea and Vietnam, along with covertly supporting Nicaragua (Boyle, 1987, p. 86). Yet, the largest threat to all nations was the potential outbreak of nuclear war. During the Cold War, the

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<sup>141</sup> One obvious exception to this is Israel, whose state security is primarily focused on protecting the homeland, rather than supporting peace missions abroad.

armed forces (especially in democratic countries) started to become largely professional armies, defining their mission as not only protecting their homeland, but also the territory of their allies. Media relations during the Cold War were strongly manipulated. At that time, the use of civilians, i.e. non-military staff, and contractors within the army increased, in conjunction with socio-cultural changes, such as women being partially integrated in the military, homosexuals being discharged without physical punishment and conscientious objection (in certain cases) becoming permitted.

Most Western armies in contemporary societies can be classified as post-modern in nature (post-1990). With the end of the Cold War, internal and ethnic conflicts, not to mention terrorism, replaced communism as the major threat. This is reflected in the proliferation of international security theories in the beginning of the final decade of the twentieth century, principal of which were two major competing theories: Fukuyama's end of history thesis vs. Huntington's clash of civilizations. Fukuyama suggested that democracies would no longer engage in military operations against each other because global capitalism would bind states closely together, while Huntington suggested that "civilizations will clash" and that conflicts are inevitable (Baylis & Smith, 2005, p. 137). The early nineties were marked by ethnic conflicts, the most dramatic of which being the war in the former Yugoslavia and the Rwandan Genocide. September 11, 2001 marked the first decade of the next millennium and signalled the beginning of the war on terror, at least from the Western perspective, while in numerous former Third world countries, ethnic conflicts continued to lead to humanitarian disasters. While the Western militaries remain entangled in seemingly endless wars in the Middle East (Bacevich, 2016), the Arab Spring incited ongoing chaos, tensions, and civil wars in numerous Northern African states, from which the United States has distanced herself (Pollack, 2016).

The Charter of the United Nations, in Article 39, stipulates that a threat to peace and security in an area constitutes a justified cause for the use of force if all other means have been exhausted. NATO member state governments increasingly experienced that they had not allocated sufficient resources to engage in UN peacekeeping or peace-making missions, even though some post-modern armies include humanitarian concerns in their mission statement.<sup>142</sup> Germany is a particularly interesting example, in that its armed forces play an important contributory role to international organizations (EU, NATO, UN), in part, out of a desire to cultivate a post-national identity in the aftermath of World War II (Fleckenstein, 2000, p. 82). A key aspect of this policy is that the Bundeswehr will not embark on missions on its own, but rather will work to support its allies.<sup>143</sup>

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<sup>142</sup> In the U.K., the first role of national defence institutions is to protect and ensure the security of its territory. In NATO states, this includes the security of the territories of Allies (as one can see, for example, in the U.K.: 1. Ensure the protection and security of the U.K. (and Dependent Territories), 2. Ensuring against major threats to the U.K. (and its allies) (Art. 51) and 3. Promoting wider security interests through the maintenance of peace and stability (UN mandates) (economic) (Dandeker, 2000, pp. 32-33).

<sup>143</sup> Obviously, if the territory of Germany was attacked, then NATO members would support this mission.

In light of the “new”<sup>144</sup> threats facing post-modern armies, such as ethnic conflicts and terrorism (Kaldor, 2007; Münkler, 2005), there has been a marked shift towards constructing small professional armies, comprised of an all-volunteer-force (AVF), as well as an increased reliance on civilian contractors to better deal with the asymmetries of the conflicts. Media relations in post-modern armies are also courted changes are also likely to be subsequently reflected in the armed forces (Moskos, 2000, p. 15).

In recent years, the roles of military and other armed services have increasingly overlapped; for example, in post-modern conflicts, the military is primarily required to function as a peacekeeping force (including policing), while in other states characterised by political turmoil, the military is routinely used within its own territory (e.g., Greece, Iran, Arab Spring) (Kaldor, 2007). Hence, increasingly armies are not fighting each other (the Clausewitzian War, or modern army), but instead are engaged in combat with small, more or less organised armed groups, such as terrorist organisations. This so called mission creep is particularly important in the context of the post-modern military being deployed to engage in asymmetrical warfare (Caforio, 2010). Post-modern missions require soldiers to avoid the application of maximum force, to distinguish between the enemy and the civilian population in situ, and simultaneously, winning hearts and minds, while the adversaries may be less likely to respect international law (Blocq, 2009). The organisation has had no choice but to undergo significant changes to properly deal with these challenges.<sup>145</sup> Given that post-modern armies are less “total” (and more civilian) than they were previously, some scholars have come to refer to them as “greedy institutions” (Soeters et al., 2003). So called greedy institutions emphasise their members’ total commitment rather than insisting on controlling the individuals’ residence and the organisation of their social lives (Davies, 1989). A greedy institution appears to be based on voluntarism and individuals’ devotion (like monks, for example) as opposed to the total institution, which is enforced upon people, like a prison or a mental institution, and does not include an element of belief. However, once again, there are military institutions such as the German Bundeswehr, that regard their members as civilians in uniform.

Politicians’ perceptions of threats that the military must respond to most obviously impacts upon the size and structure of the military at any given time, as witnessed in the restructuring, centralisation and expansion of the U.S. Army both during and after World War II and during the duration of the Cold War (P. W. Singer, 2003). In the aftermath of the Cold War, during the post-modern period, the U.S. Army decreased from more than three million to around one million personnel, in conjunction with the concomitant growth in outsourcing military tasks to private companies (P. W. Singer, 2003, p. 53). This testifies to how the military

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<sup>144</sup> Despite the fact that such threats are not “new”, they nevertheless fall under the category of “new wars” as they became the primary causes for interventions after the Cold War ended.

<sup>145</sup> This mission creep might represent one source of confusion for soldiers about which actions are moral/legal. While they were invariably trained to kill, now they have to protect the local population, who they at times cannot distinguish from the “enemy”, even though the army attempts to educate soldiers about the local culture (anthropologists) (Den Boer, 2018).

institution is dynamic in both size and in terms of set-up, depending on the parent nation's demands. Most importantly, the historical context that defines state-actors' perception of what constitutes a threat is not consistent over time and impacts upon soldiers' work.

Notwithstanding the erosion of some of these traditional elements of the military and the evolution of the institution impacted by an increase in privatization, social changes, new operations, and so on, their principal function of protecting the state's security interests remains unchanged. Threats are defined by the government and impact upon the orders that soldiers receive. For service members, the definition of the threat, as well as the military operations a state engages in, are thus of crucial importance. Prior to the Cold War, soldiers fulfilled their function of either protecting and defending the territory from aggressive armies, or they were fighting to ensure their regime's security interests overseas. For example, Hitler declared that the Jewish culture constituted a major threat to Germany's national security, and, consequently, had to be eliminated. Soldiers' tasks involved killing defenceless Jewish civilians. Furthermore, Germany, within this ideological worldview, required additional Lebensraum, which required soldiers to fight aggressive expansionist wars. Conversely, for most neighbouring countries at that time, Hitler and the German Wehrmacht constituted the greatest threat which had to be stopped.

In addition to preserving the security of the state from foreign interventions, post-modern military institutions are increasingly expected to perform other tasks in a range of domains, such as conducting humanitarian missions, preventing and responding to cyberattacks, or fighting terrorism (preventing attacks on civilians by armed groups), which all threaten the well-being of the parent society.<sup>146</sup>

Two related historical factors that impact upon the institution and by extension its individual members are, firstly, the period in which an individual joins the military and, secondly, the way in which leadership defines the threat to be contained. The historical context determines whether a military draft is required for the tasks that the military must carry out. For example, there is a clear difference between a soldier who has been recruited via a public draft and a soldier who joins an AVF. For example, young men who decide to become soldiers may have a different outlook than those who would never have considered voluntarily serving in the armed forces. Scholars have argued that a self-selection bias exists in AVFs, namely, that individuals who choose to join the armed forces have a pro-military outlook, a better perception of military opportunities, as well as sharing views on military supremacy, intervention and obedience (Bachman, Sigelman, & Diamond, 1987). Therefore, one could suggest that individuals who voluntarily join the military may also be predisposed to place greater trust in what the government defines as a threat. Conversely, soldiers who enter the

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<sup>146</sup> The definition of a threat directly impacts upon the types of military operations and the mission goals. For example, for humanitarian missions, armed forces need to adjust their rules of engagement. The mission necessarily limits the use of lethal force by supposed helpers and protectors, and places soldiers in situations where they are often unable to complete their missions, such as being unable to stop some of the worst atrocities of the Rwandan genocide or the massacre in Srebrenica.

military by means of conscription may be more critical of the military institution and the government's definition of a threat.

Secondly, the definition of a threat impacts upon individual soldiers in terms of the types of operations and missions that they will be sent to. For example, in the modern period this threat mainly involved external invasions, during the late-modern period communism and capitalism were the opposing threats, while the post-modern period is defined by a broader and more diverse range of threats. The threat will in turn impact the rhetoric used within the military in which it is defined who constitutes the enemy of the soldier.

### **3.3. Military training**

Military training provides the recruit with basic technical skills, such as handling weapons and becoming a loyal group member. Furthermore, it also prepares the individual to function effectively under stress and it aims to breakdown and reconfigure people's natural resistance towards killing (Grossman, 2009; Holmes, 1985, p. 32). As Ricks observed in relation to Marine Corps training, "over the next eleven weeks, the recruits will endure a pace of as many as fifteen orders per minute, everyone a reminder that they have left a culture of self-gratification and entered a culture of self-discipline" (Ricks, 2007, p. 43). As aforesaid, the military's task of protecting the security of the state is carried out, if necessary, at the risk of the life of its own members. Of course, non-suicidal people have a strong desire to stay alive. Similarly, non-deviant people do not have a strong desire to harm or kill other human beings. In contradistinction to what people learn during the course of socialisation in civil society, military training aims to normalise violence towards others, while, simultaneously, preparing service members to give up their own life if need be. In order to get men, and in post-modern armies women also, to overcome previously learned norms, individuals joining the armed forces have to undergo a transformation process during training (Grossman, 2009; Smeulers, 2011). Wolfendale (2007) argues that military training specifically sets out to minimise soldiers' moral agency and to instil unreflective obedience in soldiers. The recruit must obey orders and function in situations in which his life is at stake. It is for this reason that high-stress simulation is a key component of soldiers' training.

It is important that one distinguishes between enlisted soldiers and officers, because enlisted members of the armed forces go through a very different training regimen than their officer counterparts. This section first deals with recruit training, rather than with the education of military leaders. While entry into the military differs from country-to-country, across different branches of the military and over time, specific aspects that are common to the general military rite of passage are discussed in the section below. The duration and intensity of military training depends on the society, historical context, and branch that soldiers are joining, as well as whether they are conscripts or have volunteered to become service members (Dyer, 2004, p. 35). Basic military training lasts between ten weeks up to roughly four months, during which the recruit learns about the organisation and its values, becomes

physically fit and receives weapons training, before he or she graduates and can call themselves a soldier. During times of high troop demand, training is often shortened. For example, the U.S. military reduced basic military training down to only seven weeks during World War II.<sup>147</sup>

As outlined in Chapter Two, socialisation can be divided into primary and secondary modes of socialisation.<sup>148</sup> Primary socialisation takes place during early childhood when children learn about social interactions and/or behaviour. This is primarily influenced by family and friends and is likely to have been fostered in schools. Above all, young people learn that they are not to cause harm to other people. In many societies, particularly individualised societies, they also learn to think for themselves. Secondary socialisation proceeds primary socialisation and comprises individuals entering a narrower subgroup of society, or a profession, which generally takes place in educational training institutions. It should be reiterated here that in times of peace there may be a different representation of society in military personnel, due to self-selection in that individuals who volunteered may simply be more in favour of obedience and aggression (Bachman et al., 1987). By contrast, during times of conscription, the army benefits from a larger variety of recruits, albeit higher educated people are more likely to avoid military service (Holmes, 1985, p.82).

The process of socialising civilians into the military organization ordinarily comprises two aspects. The first one can be understood as “degreening”, which uses the mechanism of degradation or even mortification to transform the civilian status of the newcomer. The second aspect of the socialisation process pertains to the construction of a new identity, whereby the individual absorbs the new norms, authority, disciplinary codes and so on.

### **3.3.1. De-individuation**

De-individuation can be understood as the process by which an individual becomes or feels like an anonymous person (Smeulders & Grünfeld, 2011, p. 207; Zimbardo, 2008, p. 301). The first step towards transforming an individual who has spent most of their life developing a sense of self and individuality (at least in Western culture) is to disconnect the individual from their previous self-image and everything else that reminds them of civil society. Similar to what occurs in prisons (also a total institution), recruits must hand over all personal items, along with removing all their clothing and jewellery. According to Rick’s assessment in *Making the (Marine) Corps*, the process involves disorientating new recruits by means of sleep-deprivation and keeping them in the dark about what they will do until the very instant that they have to take immediate action (Ricks, 2007, p. 28). The mechanisms by which young men are transformed into Marines is analogous to the procedures and rituals used in

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<sup>147</sup> In World War II, the Wehrmacht, by contrast, insisted on 14-16 weeks of basic training, which numerous scholars cite as the reason for the Wehrmacht’s success (ibid.).

<sup>148</sup> Primary socialisation can be anticipatory and a predisposition for military values when, for example, “endo-recruitment” occurs, which is often combined with forms of child-rearing that instil obedience and bravery into individuals (Caforio & Nuciari, 2003).



other branches of the armed forces. They receive identical uniforms and haircuts. In addition to practicalities, looking alike also constitutes a crucial component of dissolving one's individual's identity (Holmes, 1985, p. 34). A further tool in strengthening the process of de-individuation is that recruits should refrain from using the first-person. At this point, all the youngsters must remember their platoon number. "From now on, you are no longer he, she, it, or whatever you was" Sergeant Lewis instructs the new batch of Marine recruits at 2:50 AM after they have been awake for a minimum of 20 hours, before proceeding to state: "You are now recruit-and-your-last-name" (Ricks, 2007, p. 40). Recruits should start to think of themselves as one of the group, as opposed to an individual who needs or wants anything.

The soldier must be strong, effective, group-minded, and be prepared to act violently without hesitation. Before joining the armed forces, the individual was socialised as a (an aspiring) moral person who would not harm others; now the opposite is required. Ricks calls this a value-transfusion, in which recruits learn a new way of talking, walking and thinking (Ricks, 2007, p. 43). In order to achieve this drastic change and make the individual susceptible to a new identity, it is crucial to make recruits as alike as is humanly possible.

Recruits do not leave the fenced-off areas, while even commissioned members of the services find everything they need for day-to-day living on the grounds. As a result of their segregation from civil society, all recruits see and experience is the military institution. During training, recruits do not think about what they do next, as their schedule has been determined for them. Within the military, recruits whole "new" life of sleeping, eating, working and socialising takes place within the institution, which serves to function as their new employer, society and environment. The change in the social environment is crucial for the transformation process, because it makes recruits more open to assuming the new norms and values. Previous beliefs and self-sufficiency come to be replaced with helplessness and the need and desire to adopt a new identity, that of a man, brother, warrior or marine (Dyer, 2004, p.42).

The feeling of isolation (and being far away from friends and family) creates an incubatory space for new values and social roles to emerge. The soldier also must replace their friends and family, who were important to them in their former life. In the Marine Corps, two important figures emerge during training: the commander and the drill instructor (Ricks, 2007). The drill instructor is tough, harsh, but yet often fair, while the overlooking superior commander is highly regarded and often adopts the role of a father figure, whom the recruits want to please. This is supported by the overt usage of family/paternalistic references in the military, such as calling it a brotherhood (*semper fi*) or commanders referring to recruits as "sons" (Dyer, 2004, p. 46).

During the initial stages of training, recruits are physically assimilated as much as possible, so that all social clues about the individuality of each recruit are removed. At the same time, the recruit is provided with the source material for a new identity, one deriving from their sole belonging to the unit and the armed forces. Wearing the uniform and insignia symbolises

this new identity, while being part of the unit is presented as ultimate goal and meaning of the training.

Recruits who try to “show individuality” by displaying non-compliance with orders, rules or regulations will be sanctioned for doing so. This punishment serves to teach recruits that their own ideas about how and when to do things are no longer acceptable. Instead, everything they must do and how they should do it is now determined by their superiors and drill instructors. This enforced norm (such as, for example, how to shave or how to dress) is part of the de-individuation process. Drill instructors often use harsh language and humiliate new recruits, with the express intention of “breaking down” their old personality and instilling in their place pride and honour. De-individuation, as Zimbardo demonstrated in his infamous Stanford Prison Experiment, reduces people’s personal sense of accountability and increases their willingness to conduct “evil actions” while wearing a uniform and playing a role (Haney et al., 1973). By “evil actions”, Zimbardo was referring to his subjects’ increased willingness to become violent and display abusive behaviour when playing the role of a prison guard. The first element of training can thus be understood as an explicit attempt to reduce the individual moral agency of the soldier.

### **3.3.2. Initiation and re-socialization into the group-identity**

In some units, initiation rites, or rites of passage, constitute an integral part of becoming a member of the armed forces (Winslow, 1999a, 1999b, 2000). Winslow’s frequently cited study on the *Initiation Rites of the Canadian Airborne Regiment* offers useful insights into specific mechanisms of group bonding (Smeulders, 2011; Soeters et al., 2003; Wolfendale, 2007). While general military training supports recruits’ bonding, informal procedures strengthen this process significantly. Aronson and Mills (1959) found evidence to support the hypothesis that the harsher the initiation procedure, the more individuals look up to the group they have gained membership into. Indeed, in an experimental setting, Aronson and Mills demonstrated that women who went through the most embarrassing initiation judged their own group’s discussion as being better than those who underwent a less humiliating or no initiations. Aronson and Mills explain their findings through recourse to Festinger’s cognitive dissonance theory, arguing that subjects decreased their dissonance by over-evaluating the quality of their respective group (Aronson & Mills, 1959, p. 181). The consequences of such harsh initiations are of especial importance for elitist and specialised units, which put their recruits through increased hardship than other groups. These units also offer greater self-esteem to those recruits who make it through the training and hazing. In the military, humiliation is an integral aspect of initiation, as the recruits need to feel that their membership in the military is rewarding (i.e., that it is an honour to fight and die for your country and comrades). According to the late military anthropologist, Winslow, the more specialized and elitist a group is, the harsher the initiation rites become (Winslow, 1999a).<sup>149</sup>

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<sup>149</sup> Interestingly, aside from the fact that the initiation rituals of the Canadian Airborne Regiment frequently include racist elements (a black recruit having *I love the Ku Klux Klan* written on his body), various forms of physical contact

Harsh physical training is part of soldiers' rite of passage; it increases how much they like the group, raises their self-esteem (by means of physical fitness) and, ultimately, strengthens group cohesion (Holmes, 1985, p. 47; Soeters et al., 2003; Winslow, 1999a, 1999b).

Furthermore, tough physical training helps open the recruits up to adapting to new values and roles, the hierarchical structure of authority and discipline (Soeters et al., 2003). These drills are also intended to prepare the soldier for the stress they will experience during deployment. The rationale here is that when recruits show signs of stress during the drills, armies can weed out unsuitable candidates, if they can afford to do so (Dyer, 2004, p.44). Drill instructors ensure that recruits do not have time to consider the nature of their duties and are suitably terrified to disobey orders. A simple reward for "good" behaviour and punishment for "bad" behaviour further instils obedient behaviour and in the terms of Kohlberg, instils pre-conventional moral development.

Consequently, there is simply no place for engaging one's moral competence. Orders, no matter how ridiculous, must be followed without question. The U.S. Marine Corps training is an extreme example of how mechanisms are used to transform young civilians into military personnel. In other units, branches and countries, training may be less harsh, especially if the parent society, as is the case in the Netherlands, regards itself as a-militaristic, non-martial and unheroic (van der Meulen & Soeters, 2005, p. 538), and carries a reputation for being "too sweet and innocent for war" (Sion, 2006, p. 454).

On an individual level, the harsh training shows individuals unequivocally that they are capable of more physical exhaustion than they ever thought they could take, and that they can endure more insults and humiliation from the drill instructors than they could at the beginning of their training. In the British Royal Marines, for example, the training amounts to the level of fitness of international athletes in only 32 weeks. As Aronson and Mills argued, there is a strong link between enduring physical hardships and coping with psychological stress on the one hand, and, on the other, feeling good about oneself and what one has achieved. The soldier thereby gains an additional source of positive self-regard, stemming from their newly developed self-image as a soldier. They no longer hesitate, does what is asked and does it well, because they have been trained to do so and to feel good about it.

The drill also contributes to the transformation and installation of a new masculine identity (Holmes, 1985, p. 45). The profanity used in the military jargon, which often downplays the masculinity of new recruits, is ultimately intended to strengthen their resolve to become more manly (Holmes, 1985, p. 46). A secondary goal of training and drills is that the soldiers will bond with one another. During training, collective punishment reinforces group identity and

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with faeces and nudity among recruits (two recruits dancing naked together on a table) stand in marked contrast to the normally homophobic culture of the Regiment (Winslow, 1999b). According to Winslow, revolting actions make the recruits grow together more closely. For example, the racist actions aim to overcome the very fact that the recruit is black; it should no longer matter what colour his skin is or what this meant in civil society, all that counts now is that he is one of the group.

group bonding by reinforcing a sense of collective responsibility (Dyer, 2004, p.47). Group norms override what the soldier has learned in his civilian life. Because the soldier comes to accept a reward and punishment system which does not encourage arguments or debate, she or he is more likely to go along with- and accept the norms. It is comrades who ordinarily become the “primary group”, who are most important for shaping norms and impacting upon behaviour (Smeulders, 2011, p. 273).<sup>150</sup> While soldiers become increasingly isolated from their peers and family outside the military, they are going through the mental and physical hardship with their comrades. In leaving friends and family behind, soldiers thus create room to make new friendships within their unit. The common training experience serves to bond them together, especially because the military often uses group punishments to make the unit stick together and help each other (Ricks, 2007). The initiation and re-socialisation into both units and military life generally mimics and prepares the recruits for stressors they will face in the battle-space, as well as laying the groundwork for future bonding when the soldiers are deployed abroad.

### **3.3.3. Training in law and ethics**

In the United States, recruits will learn about the Laws of Armed Conflict in the 10 -week basic training course.<sup>151</sup> Soldiers are expected to know the punitive articles of the Uniform Code of Military Justice, see Chapter One. It can be assumed that the lower the rank, the less the soldier will be educated in legal matters. As discussed above, traditional training aims at creating a reflexive, not a reflecting soldier (Wolfendale, 2009). By contrast, the training of officers aims at producing effective decision-makers.

Just as a degree of social stratification can be found in the parent society, the self-sufficient military requires higher educated leaders as well as more skilled personnel. The differences between soldiers and officers are pertinent because officers carry responsibility for their subordinates (command responsibility), while soldiers carry out the task they have been given (and are legally obligated to obey lawful orders), as discussed in Chapter One. Officers have to be respected and regarded as authority by their subordinates. The strong delineation between educated officers who lead the corps and trained enlisted soldiers, who carry out orders, has been alluded to above.

The Officer Corp is in charge of commanding the military personnel, which leads to a strong stratification between officers and enlisted soldiers. Officers attend higher education institutions, such as the West Point Military Academy, or the Naval War College in the United States. Cadets receive a university degree and are taught in the intellectual, physical,

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<sup>150</sup> This is somewhat different for conscripted young men, who have been forced to join the army and continue to reject everyone in the armed forces. In most cases, soldiers develop strong bonds with those they fight with side-by-side in combat.

<sup>151</sup> See: “What to expect from basic military training” by Rod Powers (2019), see list of internet sources.

military, ethical, spiritual, and social dimension of training.<sup>152</sup> All cadets receive a Bachelor of Science degree, and are prepared to become leaders of the U.S. Military. In addition to the academic program, the cadets at the Academy take part in a physical program (including both physical education classes and competitive athletics).<sup>153</sup>

According to the West Point Academy, the ethical, spiritual, and social development occurs formally and informally throughout the 47 months as a cadet. These include formal instruction in the important values of the military profession, voluntary religious programs, interaction with staff and faculty role models, and a vigorous guest speaker program.<sup>154</sup> This extensive curriculum can hardly be compared to the basic military training that enlisted soldiers receive. Leaders are trained in the Law of Armed Conflict and to differentiate between legal and illegal orders. Furthermore, focus on improving officers' ethics training is clearly present in Western militaries (Carrick et al., 2009; Mileham, 2008; Olsthoorn, 2008; Robinson et al., 2008; Werdelis, 2008; Wertheimer, 2010).

By contrast, very little is known about legal and ethical training of enlisted members, presumably because they are not regarded as leaders. Yet, in 1999, General Krulak stressed that the new, asymmetrical wars require a "strategic corporal", junior leaders, who must be able to confidently make well-reasoned and independent decisions (Krulak, 1999). Krulak's suggestions have been received in incorporated in training manuals (Stringer, 2009). Yet again, Krulak discusses *junior leaders* rather than the soldier at the end of the chain of command, which is at the centre of the present study. A reasoning behind the apparent lack of ethics training for enlisted members may be that they only need to be able to identify illegal orders, which they should refuse to carry out. For all other non-legal, but ethical questions, the soldiers' immediate superior should be responsible for the decision-making.

Despite the fact that it appears that enlisted members receive too little legal and ethical training, extensive education of their superiors matters greatly to them as well. The Officer Corps has a direct impact on the enlisted soldiers because they lead and guide military personnel through missions and everyday life. Leaders and their orders need to be respected

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<sup>152</sup> At West Point for example, the student body, or Corps of Cadets includes about 4,400 a year, of which about 1000 are commissioned officers. Its academic program includes 26 core courses (as well as additional elective courses), and offers cadets to graduate in more than 40 majors.

<sup>153</sup> Very central to the education of West Point graduates is the so called Military Program, which begins on the cadet's first day at West Point. Part of this Program is the induction of the 7 Army Values": Loyalty, Duty, Respect, Selfless Service, Honor, Integrity, as Personal Courage"- as well as the "Cadet Honor Code", which states "A cadet will not lie, cheat, steal, or tolerate those who do." Most military training takes place during the summer, with new cadets undergoing Cadet Basic Training - or Beast Barracks - in the first year, followed by Cadet Field Training at nearby Camp Buckner in the second year. Cadets spend their third and fourth summers serving in active Army units around the world; attending advanced training courses such as airborne, air assault or northern warfare; or training the first and second year cadets as members of the leadership cadre.

<sup>154</sup> As discussed above, militaries have different statuses in society which results in different virtues: Germany, for example with its particular history created a military focused on defense, considering its soldiers as civilians in uniform (Werdelis, 2008). Many officers are taught "innere Führung" or "inner guidance" at the Bundeswehr Center for Inner Guidance. When it comes to decision-making for German military leaders, officers are trained to search for answers within themselves, rather than looking up to the chain of command.

to avoid abuse of power as well as a deterioration of the moral guidance of soldiers (Winslow, 1999a). Winslow particularly examined the above-mentioned unit of Canadian soldiers who tortured the young Somali to death, found that not only extreme initiation rites led to the misplacing of loyalty towards the group rather than their leaders, the military or the mission, but also that leaders were not aware of the deterioration of the standards of the unit. Having a leader who is neither respected nor informed about what is happening at the subordinates' level can have dire consequences, especially when considering the additional stress-factors that impact members of the military in battle-spaces.

### **3.4. Battle-space – The (social) reality of soldiers in conflict**

To better understand the dilemma that soldiers who are given illegal orders face, one must also consider how battle-space factors impact upon their environment and decision-making. Today, it is more appropriate to refer to battle-spaces rather than battle-fields, as combat takes place in various environments, ranging from urban areas to space. Attempting to understand the soldier's reality in conflict, that is how individual soldiers operate in actual combat situations, requires examining their unique combat experiences. These include shared institutional factors and the comparable transformations that soldiers experienced during their training. While the military does not value and, in fact, attempts to minimise the intrusion of individuality of each enlisted soldier during training, one must nevertheless focus one's analytical gaze on the individual level to fully understand the (social) reality soldiers face in battle.

In combat, soldiers are exposed to the ultimate *raison d'être* of the military, that is, the use of lethal force. The general levels of risk range from "cold" to "hot" situations. Through the temperature metaphor, one can determine the level of risk in peacetime situations to active war. Within headquarters and staff departments, the risk level is also lower than it is at garrisons or on vessels. In times of war, the hottest situations take place in battle-spaces, which is where soldiers fire their weapons. During periods of peace, the military prepares and practices for such hot scenarios. Hot situations place soldiers under high-levels of stress, and, it is well-established that battle-space factors impact differentially on every soldier. Even though soldiers and officers train for manifold situations, in real-life scenarios a multitude of unforeseen factors can impact on the outcome of an operation. Hot situations differ from cold ones in one crucial respect: the consequences of one improper decision under cold circumstances are relatively minor, whereas in a hot situation such a mistake can be life-threatening and even disastrous. This is why obedience in the armed forces is so essential. However, despite this need for discipline and obedience during combat, decreases in morale and discipline are a common feature in hot situations, as witnessed in Vietnam and Iraq (Doris & Murphy, 2007). By contrast, in the Cold War the two main military powers did not directly fire upon each other, but nevertheless engaged in ideological conflict and proxy wars in third territories.

### 3.4.1. Battle-space stressors

Even though soldiers learn how to cope with a range of stressors (i.e. stress factors) during their training, in actual combat the reality of the environment may be overwhelming and psychologically damaging to soldiers. A look at four battle-space factors that impact on individuals may be expedient for understanding these processes: firstly, the primary group bonding that occurs during combat due to the remoteness and novelty of the situation; secondly, the harsh and novel physical conditions individuals may endure in combat; thirdly, the numbing or brutalisation of normality that occurs; and finally, the potential absence of oversight.

The first and most important difference between cold and hot situations is that, with respect to the latter, wherever the soldier is deployed to, the environment is unknown and the people and the situations are novel. Being exposed to unfamiliar situations can create stress for individuals, who must cope with their environment, especially if they feel isolated from their loved ones.<sup>155</sup> Even though training aims to disconnect individuals from their prior bonds with friends and family, this process is rarely wholly successful (Holmes, 1985, p. 79-80). The experience of being far away from home, allied with daily encounters with life and death further intensify the bonding between comrades that training initiated.

During missions, soldiers increasingly come to relate to each other and become prepared to die for each other (Dyer, 2004, p. 34). It has been argued that soldiers who fight alongside one another in combat are closer to each other than their own family members (Holmes, 1985). This increased sense of brotherhood raises the risk of an additional stressor: because comrades fear being seen as a coward, they are thus more likely to conform to the group and go along with it even if they morally oppose the cruel actions they are engaged in. In fact, many soldiers even went so far as to say that they were more afraid of being seen as a coward by their comrades than they were of dying (Holmes, 1985, p. 208). As Osiel noted: “efficacy in combat now depends more on tactical imagination and loyalty to combat buddies than on immediate, unreflective adherence to the letter of superior’s orders, backed by discipline of formal punishment” (Osiel, 1999, p. 7).

In conjunction with replacing one’s primary group of influence from loved ones to comrades, many operations are also impacted by the different and often harsh climate and unfamiliar environments. For example, in World War II soldiers suffered from the extreme cold on the Eastern front, in Vietnam, U.S. soldiers had to deal with disease, humidity, rain and insects, while in some conflicts soldiers may have to deal with invisible enemies and an unforgiving desert environment. Harsh physical factors also impinge on one’s daily comfort, such as sleep deprivation, physical exhaustion and malnutrition (Holmes, 1985, p. 115). These physical hardships can in turn lead to increased frustration and feelings of loneliness. In Vietnam, for

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<sup>155</sup> These particular circumstances also create stress, often in the form of fear where the individual loses control over bodily functions. (Holmes, 1985, p. 205).

example, many soldiers were exhausted from dealing with the heavy rainfall and frustrated by the lack of perceived progress. While Bandura and Kelman do not explicitly include battle-space stressors as factors that increase disengagement from self-regulatory mechanisms, they nevertheless appear to have the capacity to negatively impact upon the conduct of soldiers.

The third battle-space factor that impacts on soldiers pertains to emotional stressors that can lead to increased brutalisation and forms of psychic numbing. This concerns the fact that the more individuals are exposed to seeing destruction and experiencing the harming of others, whether in terms of the civilian population or their own comrades, the more they will become “numb” to emotional responses. The reduction caused by one coping mechanism, cognitive dissonance reduction, was introduced in Chapter Two. For most individuals, the brutal realities of war simply become normal. Brutalisation refers to an increased preparedness to treat others violently. After some time in combat, most soldiers will adapt to the new “normal violence”, or habituate. Kelman refers to this common process as routinisation (Kelman, 1973, 1993). Killing and harming, or even just treating others with contempt, eventually becomes routine behaviour. This is especially the case when soldiers have lost comrades with whom they have become very close, which distorts soldiers’ feelings towards the mission and the enemy (Nadelson, 2005). For example, many outrages against civilians in Afghanistan and Iraq have been explained among other factors, in terms of soldiers’ frustrations at being unable to fight or take revenge on a real enemy (Talbert & Wolfendale, 2019).

Fourthly, in times of war, superiors who bear the responsibility for their soldiers in turn also have less oversight and control over what occurs (Dyer, 2004, p. 22). Obedience in war can be partially replaced by a consensus about what is appropriate. In Vietnam, for example, the obedience rate decreased significantly, in part, because there was a lack of oversight by the general command. Numerous crimes were committed but never reported and investigated (Bilton & Sim, 1992). This lack of order and obedience can even go as far as resulting in the killing of superiors. Once again, in Vietnam, up to 1000 disliked officers were murdered by their subordinates, a process that was called “fragging” (Holmes, 1985, p. 329).

Not knowing whether one will return to one’s homeland may also impact on individuals’ war-time frame of reference. During combat, the soldier’s military frame of reference invariably adjusts to the specific battle-space they are deployed in. In many instances, the discipline that was so crucial during training and on military compounds deteriorates as morale decreases, whereby soldiers invariably deal with stress by intoxicating themselves with alcohol (Holmes, 1985, p.244) and drugs (ibid., p. 251). As one could imagine, the use of drugs can have a negative impact on discipline, but also enhance group bonding.

Whether or not the general public supports a war can also impact heavily on the soldier, in that if they feel the war is not supported at home, it makes it harder to maintain a decent level of morale. For example, if a soldier returns a war hero, he or she feels differently about



themselves and the next tour than a soldier who is accused of being a war criminal. Consequently, the public can profoundly shape the self-image of soldiers; indeed, the loss of meaning and control is understood to be one reason for the prevalence of post-traumatic stress syndrome among Vietnam War Veterans (Shay, 1994, p. 123).<sup>156</sup>

During operations, soldiers experience physical distance from their home and loved ones, as well as losing close comrades and feeling frustrated about the mission, and have to cope with these stressors that are largely outside of the control of the military. Furthermore, the soldier must deal with the psychological consequences of the general destruction of war, as well as the potential impact from having killed or harmed someone (Grossman, 2009). The actions of soldiers are not easy to control in the battle-space and it is difficult to prevent a deterioration of morals, which, in turn, can become part of a new reality.

### 3.4.2. Battle-space decision-making

Soldiers who are ordered to carry out illegal actions must make a decision about whether to execute these orders or refuse to do so. Bradley (2011) argues that the institutional rule-driven leadership approach is not conducive to individual, autonomous moral decision-making. There are two approaches to decision-making: first, there is the immediate, reflexive, or intuitive approach; and second, there is a contemplative, deliberate and rational, or as Wolfendale suggests: *reflective* approach. Both can be deployed by most people, but the reflexive decision-making is perhaps the ideal approach for well-known situations, while the deliberate, or *reflective* approach is more suitable for novel situations in which the individual has to take more factors into account and consider the possible consequences of their actions. For soldiers, it is critical to be able to put together their weapon without deliberation, however, if and when they engage their weapon should require further contemplation.

As noted in the previous sections, the military institution trains soldiers to excel at the reflexive approach, to the point that their responses and reactions come to be reflexes (Wolfendale, 2007). Soldiers are trained to obey and to obey quickly. Soldiers are not expected, nor is it desirable for them, to deliberate over what to do in battle. On the contrary, the military training emphasises that soldiers do as their leaders instruct, independent of what the content of the order is. That is to say, soldiers must trust that their superiors' orders are legal, for the purposes of executing the mission and defeating the real threat.

Chapter Two discussed cognitive errors and biases that all people may be impacted by. Bradley (2011) purports that the same factors can lead to errors in judgment in combat as well, such as the fact that most people tend to be “cognitively lazy” and prefer to use their known approaches (mindsets) rather than attempting to view problems through a new lens.

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<sup>156</sup> Soldiers often struggle with their war-time experience when returning to their parent society. This has been seen after World War I, where numerous soldiers suffered from *battle-field fatigue*, after the Vietnam War, when thousands of soldiers were diagnosed with war induced Post-traumatic stress syndromes, or, in more recent times, where a large percentage of soldiers suffer from depression (Lifton, 1992, 1998; Scott, 1993).

This is especially the case when soldiers are sent abroad and suffering from the emotional and physical stressors of combat, and in which case deliberative and creative decision-making are likely to be negatively impacted upon.

Secondly, people are susceptible to perceptual distortions and, as aforesaid, frequently fall back upon the habitual trap of self-justification. This process can be magnified by the presence of groups, who exert social influence over the individual to make certain judgments. The battle-space environment may also foster less self-regulatory mechanisms, due to the manifold stresses it places on individual soldiers. As numerous examples of war crimes and misconduct during combat demonstrate, soldiers become more accustomed to a battle-space morale.

Bradley also argues that today's battlefield situations require soldiers who can make sound moral decisions, which he realises is not an uncomplicated process (Bradley, 2011, p. 218). Moral competence is impacted by multiple factors, including cognitions, motivation, and emotion. The organisational culture and small group processes that are essential for combat effectiveness are counterproductive for individuals' moral competence. The odds of enlisted soldiers relying on their moral self and disobeying illegal orders are thus minimised as a result.

## **Conclusion**

This chapter introduced factors pertaining to how the military institution can impact the situation of the soldier in general and by extensions also in a situation in which he or she has been given an illegal order. These "institutional" factors are environmental and social and constitute crucial elements in better understanding and explaining the behaviour of conscientious refusers.

The military institution is a necessary source of security for every state, which ensures the safety of its people, protects the sovereignty of its territory, and secures its interests. For this purpose, the military can employ lethal force, which needs to be controlled as much as possible. Control over the use of weapons is sought through a clear hierarchical top-down decision-making structure, as well as the systematic obedience of subordinates. The military has been designated as a total institution, which is delimited from society and enforces a separate set of rules and norms.

Becoming a member of the military institution changes the individual's social environment and, in turn, the social forces that are exerted on the soldier and his or her self-perception. Within such institutions, there is little room for individuality or private space, as most members of armed forces work, eat, and live on shared compounds. The norms of social and professional life are also different from those norms the individual was used to prior to

joining the armed forces. The individual ultimately comes to develop a new self-identity, in which the group identity plays a key role.

When attempting to understand the situation of a soldier who receives an illegal order, various factors need to be considered, including the historical context and changes that have occurred over time, such as in terms of how the civil leadership defines threats. Doing so affords an understanding of how violence may be authorised. One must also investigate the specific branch and unit of which the individual soldier belongs to, because the dynamics of a specific group and the nature of the military task or operation determine the frame of reference of each soldier. Whether the individual has voluntarily joined or has been drafted can also make a crucial difference to their ability to rely upon their own moral competence.

Through training and indoctrination, the institution instils a military identity, and at times aims at changing young individuals into willing killers ready to risk limb and life. In fact, it has been argued that military training specifically aims to replace the civilian identity of the recruit with the military identity of the soldier. The new identity constitutes a strong, obedient, masculine, and honourable warrior, who loyally serves their superiors, and upon whom their comrades can rely in all situations. While soldiers' identity is based on their unit, officers' identities are based on the responsibility they bear for their unit. In this respect, the conduct of comrades is crucial for the diffusion of responsibility and normalisation of illegal conduct. Moreover, the extent to which victims are de-humanised by the group and the individual also influences whether or not a soldier decides to perpetrate inhumanities or whether they refuse to commit crimes.

Especially in the battle-space, the stress of being in combat and, above all, the importance of the group become the most crucial aspects of soldiers' reality and decision-making. The social and institutional context in which individuals are located are simply not conducive to acting upon one's own beliefs, even in cases where the soldier may have the legal and moral duty to disobey and break the chain of command. On the one hand, taking those factors into account helps explain why there are so few real-life examples of soldiers refusing to obey illegal orders, while, on the other hand, it suggests that individuals who do refuse are most likely less affected by external factors than the majority of people. The next chapter is the final element in the theoretical foundation for understanding and explaining conscientious disobedience, as it introduces individuals who conscientiously disobeyed and delineates differences in how they went about breaking the chain of command and proposes a novel theoretical framework for understanding why soldiers disobey.

# **CHAPTER FOUR**

## **Toward a Theoretical Framework of Conscientious Disobedience**

## Introduction

On August 11<sup>th</sup>, 1948 three members of L company in the 3rd infantry battalion of the royal Dutch Navy directly refused the order to burn down part of the village of Sutojayan in East Java (Limpach, 2016, p. 643). Johannes van Hoog, an 18-year-old marine, sergeant Martinus Smit (33), and lieutenant Louis Stokking (28) all believed that the order was tantamount to an act of reprisal, as the Dutch had been attacked from a near village the previous day, and (collectively) refused on moral-religious grounds (Limpach, 2016, p. 644).<sup>157</sup> All three refusers were arrested and subsequently sentenced to imprisonment for 18, 24, and 32 months, respectively.<sup>158</sup> Similarly, in late October/early November 1941, officer Klaus Hornig of the German Order Police received the illegal order to shoot 780 Russian prisoners of war near Zamosc, Poland, whereby he reported to his superior that he was unable to execute the order, because as a Catholic and jurist he could not shoot defenceless victims (Überschär, 2004, p. 84). Hornig argued the order was inconsistent with both international law and German military law, specifically Article 47 of the Military Criminal Code, which does not allow the execution of an illegal order (Kitterman, 1988, p. 245).<sup>159</sup> Hornig's repeated disobedience and opposing position to how the SS executed their orders had no immediate consequences. Hornig was finally relocated and suspended only after repeated direct opposition to the Nazi policies (ibid.).

After having discussed the legal, social psychological and institutional dimensions of *why* soldiers (non)conform or (dis)obey in the previous chapters, the present chapter explores *how* soldiers can refuse to carry out illegal orders. Referring to Walzer, Osiel confirms “there is hitherto no distinction between the different forms of conscientious disobedience” (Osiel, 1999, p. 298; Walzer, 1977, p. 314). To address this lacuna in extant research, the study adopts a stimulus-response model, which argues that the (perception of the) illegal order is the necessary precondition or stimulus, as psychologists suggest, that triggers a response qua performance of a certain type of behaviour from a soldier.

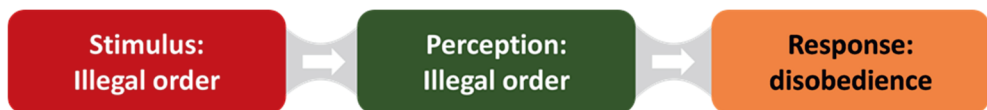


Figure 4 The stimulus-response-model

<sup>157</sup> In the Netherlands, the case is known as the Soetodjajan, Pakisadij or Brandstichtings Affair. It currently constitutes the only case in which direct disobedience towards an arguably illegal order led to the prosecution of the conscientious refusers (Limpach, 2016, p. 643). The resulting discussion revolved around the question of whether the burning down of a village can ever be considered a military necessity.

<sup>158</sup> See Brandstichtings-sententie, 1848, Uitspraak van de Krijgsraad bij de Zeemacht Oost-Indië, Militair-rechtelijk Tijdschrift 41, p.327-339.

<sup>159</sup> Das Militärstrafgesetzbuch, 1941, Article 47 (3) Der Befehl, ein Strafbare Handlung zu begehen, ist unverbindlich. (The order to carry out a crime is not binding). Interestingly, while the law codes are comparable to current U.S. legislation (see Chapter 1), Hornig also interpreted the absence of the duty to obey as an active duty to disobey. Hornig's argument was not that he would become criminally responsible, but rather that it was illegal according to German Law.

Conscientious disobedience is directly caused by the presentation of the stimulus, the fact that the illegal order has been issued, and must be motivated by conscientious motivations; in other words, the receiver of the order must deem the order to be illegal, or wrongful as defined in Chapter One, while other causes of disobedience should be excluded, such as laziness.

As will be further elaborated on in section 4.1, conscientious disobedience can broadly be defined as any defiance of instructions that are based on an individual's moral judgment. For example, Hornig stated that his own moral judgment was underpinned by his legal expertise and religious belief. Conversely, in the Sutojayan case, the soldiers conscientiously disobeyed because they felt carrying out the order would be wrong, rather than being based on their knowledge of any specific law that made the order illegal.

This chapter differentiates between types of refusals in order to contribute to the development of the present theoretical framework that will afford a better understanding of conscientious disobedience. The scarcity of accessible case studies on conscientious disobedience currently prohibits the formulation of more definitive or generalisable conclusions, however, as Oliner and Oliner observed when conducting a study on helpers and resisters during the Nazi regime, "their significance transcends their numbers" (Oliner & Oliner, 1992, p. 1). Several cases for each form of conscientious disobedience are included to illustrate the scope of soldiers' disobedience and their ability to find room for manoeuvre or "Handlungsspielraum" after having received an order that they deemed to be illegal.

The first step in understanding and explaining behaviour, including in the context of conscientious disobedience, is to choose the appropriate approach for organising the observations that are made. Therefore, a classification enables the establishment of an overview of the conduct that will subsequently be explained. In the present chapter, the first step is to consider real-life examples of how soldiers have responded to illegal orders. These scenarios are discussed and then placed in a novel taxonomy of responses, explained in section 4.2.

Two types of classification systems can be used to describe the behavioural possibilities in categories based on empirical observations: an ad-hoc classification and a taxonomy (Nachmias & Frankfort-Nachmias, 2002). The ad-hoc classification system is the lowest level of theorizing and constitutes arbitrary categories that are not derived from a more general theory of social order. An example of this would be the answer categories "strongly agree, agree, disagree and strongly disagree" for a question concerning the prohibition of smoking in public places. In this ad-hoc classification, categories are not interrelated, but rather purely described.

A taxonomy, by contrast, comprises a system of categories to fit the observations and indicate their relationships. Taxonomies fulfil two principal functions: firstly, to provide a scheme for classification; and secondly, to summarise and inspire descriptive studies (Nachmias &

Frankfort-Nachmias, 2002). In light of the fact that this research attempts to explore categories of specific behaviour (as opposed to arbitrary), using a classification system should add to the qualitative value rather than creating an arbitrary category. The taxonomy aims to represent a model of behaviour. Hence, using a taxonomy allows for the future development of both a conceptual framework and a theoretical system.

Once an illegal order has been issued, a distinction is made in the taxonomy between the possible responses of the soldier at different stages. The stages represent the time passed since the order was issued and distinguishes between immediate responses and delayed reactions of the soldiers.

In *stage 1*, as discussed below in section 4.2, the focus lies on learning about soldiers who immediately refuse to carry out illegal orders for conscientious reasons. The previous chapters have discussed numerous social influences and psychological mechanisms that can contribute to soldiers choosing to disobey the illegal order. Soldiers either obey illegal orders or they disobey. Yet, as will be explained disobedience can take two forms: (1) it can be direct, in case the soldier openly refuses to carry out the order or (2) it can be indirect, which constitutes all behaviour other than obeying and other than directly disobeying. In evading, the soldier does not directly confront his superior, but nevertheless avoids carrying out the illegal order by way of a deliberate action or inaction. Such circumvention can be conducted privately, while direct conscientious disobedience constitutes a confrontational action. Evasion can also occur as a slightly delayed response, for example after the superior is no longer present.

The taxonomy also includes delayed responses in *stage 2*, discussed in section 4.3. Irrespective of how the soldier acted in the first stage, when originally confronted with an illegal order, there is a second deferred stage in which a soldier has a range of potential courses of action. Most people who obeyed illegal orders in *stage 1* use various forms of denial to cope with what they have done (Smeulders, 2008; Staub, 1989). However, regardless of how a soldier responded immediately upon receiving an illegal or wrongful order, soldiers can choose to take action to prevent entering a *stage 1* situation again. In *stage 2*, after time has passed, soldiers can take actions that constitute delayed forms of conscientious disobedience, in particular, they can become conscientious objectors (refuse to serve) or desert from the military.

While the present chapter introduces the taxonomy of conscientious disobedience that differentiates between ways of how soldiers disobey, the final section, section 4.4, combines the elements from the previous chapters into a theoretical framework that can help study and understand why soldiers conscientiously disobey orders.

As stated above, the example of officer Hornig illustrates a specific form of conscientious disobedience. Hornig disobeyed an order, which his conscience did not allow him to follow. In Chapter Three, it was elucidated that soldiers who refuse to carry out illegal orders

maintain their moral agency, despite the availability of numerous disengagement mechanisms. To better understand soldiers' conscientious disobedience, the two core concepts used in this study are briefly examined. Specifically, which motivations qualify as conscientious ones in the context of the study will be discussed, before the chapter proceeds to discuss how disobedience can be understood.

#### 4.1. Defining conscientious disobedience

While *conscientious* and *disobedience* are both terms that are routinely used in military jargon, they are not commonly used in combination with each other. Conscientious is an adjective that, as mentioned above, qualifies a person's actions as being motivated by a moral feeling. Generally speaking, the concept is used in situations where a person carries out their task in a fastidious, assiduous, sincere and serious, if not pedantic even, manner (Brownlee, 2012, p. 3). Conscientious, for example, can also be an attribute of a conviction, in which case it describes the "sincere and serious, though possibly mistaken moral commitment that she (the person) is willing to articulate and to bear the costs for holding" (Brownlee, 2012, p. 1). Such a conscientious conviction is often a necessary precondition for the actions one undertakes, without being sufficient in and of itself to cause a person's conscientious disobedience. As an adjective, conscientious also describes another noun or verb, and has to be distinguished from its related noun conscience, which refers to a moral property (Brownlee, 2012, p. 3). Conscience can be an awareness that is not always completely accessible to us, but we should not ignore it (Brownlee, 2012, p. 4). Conscientious must be distinguished from the adjective conscious, which only refers to the state of mental awareness (counter-noun: unconscious, as explained in Chapter Two).

A well-known case of use of the term conscientious in the military refers to conscientious objection. Conscientious objection is discussed in greater detail below, yet a definition from the 2003 U.S. Military Selective Service Act is provided below to show how conscientious is applied in the context of the U.S. armed forces. It states that a person:

by reason of religious training and belief, is conscientiously opposed to participation in war in any form. (...) As used in this subsection, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code.<sup>160</sup>

Even though this definition notes opposition to war in general, the clause sheds light on the U.S. military's understanding of conscientious, namely, that it must be of religious origin, and may not constitute essentially political, philosophical, and interestingly, a moral code.<sup>161</sup> Given this fact, the U.S. understanding of conscientious would perhaps better be understood as a religious objection. This study departs from this narrow religious conceptualisation of

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<sup>160</sup> See section 4.4.2 regarding conscientious objection for a full quotation of the Military Service Act.

<sup>161</sup> How "essentially" political or moral can be distinguished from non-essential is not clear.



conscientious, as one's personal moral code and agency constitute pertinent motivations for conscientious disobedience. In the present approach, the source of the moral objection can be political, philosophical, religious, or simply legal.

As discussed in the previous chapters, both the military and social psychology's understanding of disobedience refers to any failure to execute an order or demand. This includes, *inter alia*, not showing up for duty, failing to carry out a direct order, or refusing to follow regulations. Therefore, any deliberate non-execution of an illegal order is included as a form of disobedience. Furthermore, it is important to distinguish between direct and indirect modes of disobedience. While direct conscientious disobedience involves open or direct refusal and confrontation with a superior, indirect disobedience refers to the circumvention of carrying out an order and is thus also labelled as evasion below. As a result, conscientious disobedience encompasses all failures to carry out wrongful orders on moral grounds.

## 4.2. Taxonomy of responses

To explain the general options available to an individual upon being confronted with a negative stimulus, something they do not want to do, a general example is firstly considered. That is to say, when a mother tells her five-year-old son to go clean up his room, which he does not fancy doing, he can either clean the room (and hate doing it) or he can choose not to clean his room. The former behaviour may upset the child, but please the mother. Obedience will typically not have many immediate significant consequences. Conversely, the latter, disobedient behaviour may bring about all kinds of consequences. What these consequences are, of course, depends largely on what the mother ordinarily does (argue, spank the child, walk away, etc.) and possibly on the kind of day the mother is having.<sup>162</sup> How the child refuses, might impact the consequences as well. The child might oppose his mother and say "no, I am not going to tidy up my room". Most likely, the child will experience an immediate response from the mother.

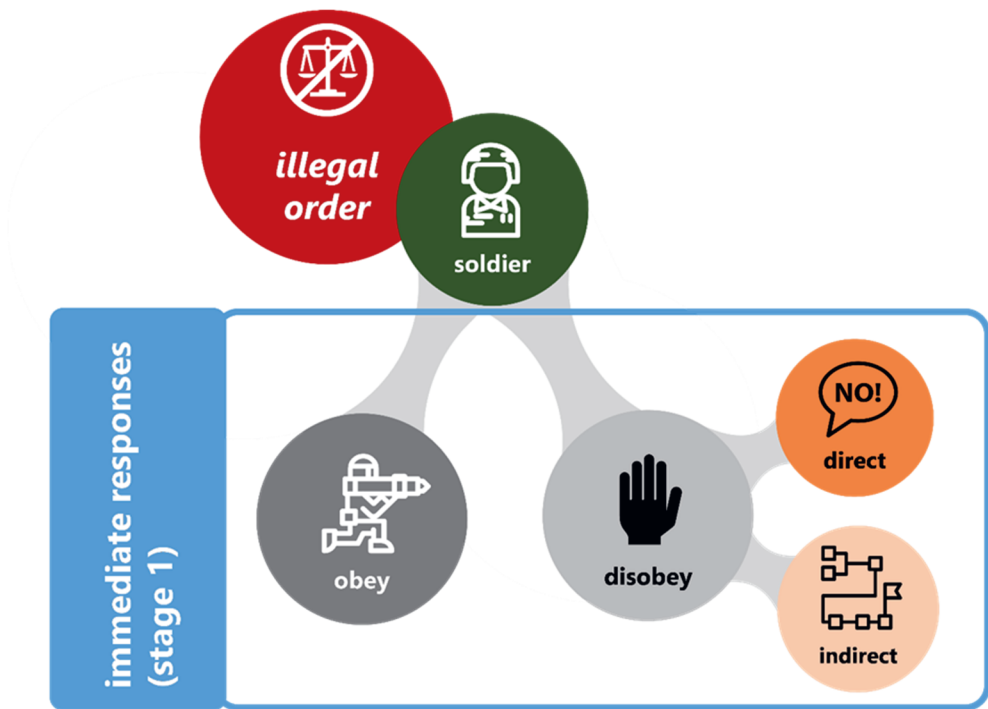
Alternatively, the boy may also come up with a third possibility to that of openly refusing the mother's demand, or cleaning up his room: he may find a creative way to evade having to carry out the task. For example, by distracting the mother with something else, like falling down and hurting himself, or saying he was going to clean up the room, but actually not doing it. Subsequently, this evasive behaviour may well bring about consequences, once the mother realises that the child disobeyed her. Yet, in evading his mother, the child did not directly confront her with his disobedient behaviour and does not have to deal with the immediate consequences of not obeying (yet).

The immediate responses to an illegal order a soldier can take are not entirely different, and, hence, have been labelled as *stage 1* in the taxonomy illustrated in Figure 5. As discussed

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<sup>162</sup> Yet, the consequences a child expects to receive (punishment) may have an impact on whether the child obeys or disobeys.

above, the first element in the taxonomy is always that an illegal order has been given (the stimulus). After the individual has realised that the order he received should not be obeyed, generally, the soldier has the same two immediate-response options. Firstly, he or she either obeys and carries out the orders, or they disobey and do not do what they were ordered to. Disobedience can take two forms: it can be direct in that the soldier openly expresses that they refuse to obey the order, or indirect, in which the soldier chooses neither to obey nor to announce their disobedience. Because the soldier does not carry out the order when they evade, evasion is considered a form of disobedience. These three options, obedience, direct disobedience and indirect disobedience will be discussed in greater detail in section 4.3.



*Figure 5 Taxonomy of conscientious disobedience stage 1: immediate responses*

The different behavioural options should be understood as dynamic as opposed to static. After a soldier receives an illegal order he or she may first refuse (or try to refuse) and then be forced to change their course of action. Also, aside from engaging in different responses to the same order, the same individual could also find themselves in a variety of different scenarios in which they have been given various illegal orders. The same person may not behave consistently; in one situation they may have the “opportunity to evade”, while in another, they may be too closely supervised to perform such an action.

Irrespective of which of the three immediate actions an individual may choose, there are also options to respond at a later stage, labelled as *stage 2*. Going back to the example of a son and his mother; the son, irrespective of what he chose to do in the first place (clean up, start a fight, or evade the situation), he may hate cleaning up so much that he decides to engage in a course of action that will result in him never having to clean up again. For example, he could attempt to reason with his mother and establish new rules according to which he should not be responsible for cleaning his room. He may also seek to involve his father in this argument. Conversely, on a more extreme level, he could try to run away and move in with his friend, based on an understanding that he would not be expected to clean up in this new abode.

Similarly, the soldier also can engage in various delayed actions in the second stage, subsequent to more time elapsing. Irrespective of whether he or she first obeyed, disobeyed or evaded the order, the newfound distance to the order, the commander and the victim, may lead to the soldier removing him or herself from the situation in which the illegal order was given, in order to avoid a similar future occurrence. In most armies, soldiers can apply for the status of conscientious objector, which entails a rather difficult legal process, or, if they see no other way out, they may decide to desert from the military. The responses are illustrated in Figure 6 and further explained in section 4.4.

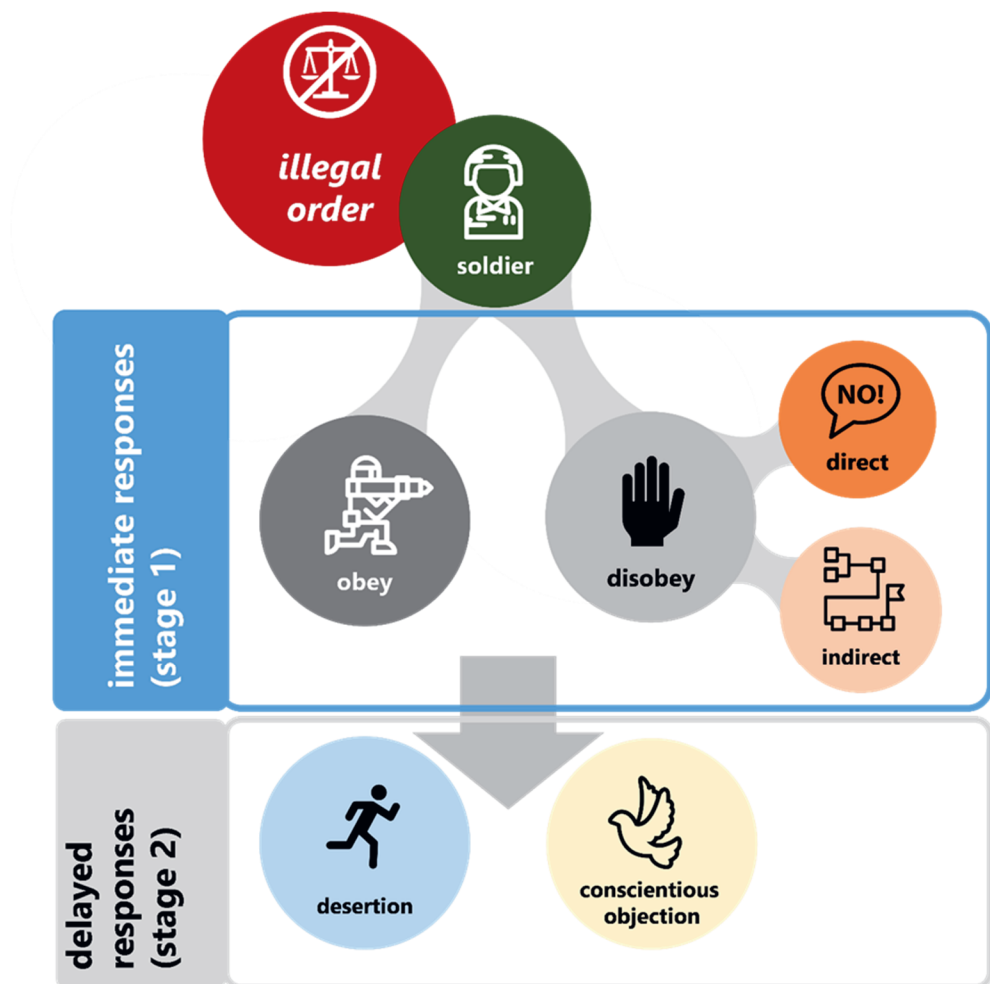


Figure 6 Taxonomy of conscientious disobedience stage 2: delayed responses

There are some obvious shortcomings in the mother-child illegal order-soldier analogy: the child's instructions to clean up the room are not illegal, but most likely quite appropriate (perhaps not in the eyes of the child), while the illegal order is wrong per se. Therefore, the soldier has a good reason to refuse, at least on paper, as discussed in Chapter One. However, the immediate consequences in both situations are dynamic and unpredictable. While they are likely to affect future behaviour, they cannot be accounted for – they are unknown so to speak. Immediate, or *stage 1* responses to illegal orders are the most relevant ones for this study, in that only those determine whether the soldier commits the crime and because the soldiers' actions can be clearly linked to the stimulus.

The first item that is crucial for the taxonomy is the stimulus that triggers soldiers' responses: the actual presence of an order that usually induces one to commit a crime or in case of wrongful orders, which are simultaneously lawful and illegal, as discussed in Chapter One.

Whilst the present study is primarily concerned with soldiers who (conscientiously) disobey and evade carrying out direct illegal orders, this chapter also encompasses additional cases, in which not all these elements were met; in particular, cases in which the policy or order was formulated in such a way that it seemed lawful at first sight, but would likely be interpreted by the receivers as requiring them to engage in illegal actions, one could refer to these as indirect illegal orders. This sub-category of indirect illegal orders comprises controversial orders that instruct soldiers to refrain from intervening when they witness crimes being committed.

In order to demonstrate a range of possible behaviours, the present analysis comprises cases of other military groups, officers who refused, as well as cases of refusing indirect illegal and immoral orders. These must be clearly distinguished from responses to illegal orders when the chapter turns to explain soldiers' responses at a later stage. However, for the purposes of describing what soldiers have done and hypothetically are able to do, all conscientious responses are of relevance. For example, in many cases, war crimes are the result of criminal conduct by individuals, but are not based on direct orders. Soldiers who intervene in such situations are of marginal relevance to the study, yet their responses are not included in the present framework as they have not received an illegal order.<sup>163</sup> Some of the cases of conscientious disobedience include military personnel beyond the target group of enlisted soldiers. While officers and commanders perhaps have a greater ability to refuse orders than soldiers have, at this point of the development of the theory, the response itself is the central point of interest. The study encompasses cases in which members of militarised police forces (such as, for example, the Order Police during World War II) either refused to obey or evaded obeying illegal orders.

Furthermore, other cases will be referred to in which the order given was not (manifestly) illegal, or cases in which the order was to abstain from taking a certain course of action (as above referred to as indirect). The present study does not take into account specific UN missions, in which military personnel received orders that did not allow them to save the people they were sent (in part) to protect, as was the case with the failure to both prevent the genocide in Rwanda and the mass executions in the former Yugoslavia (Sion, 2006). As discussed in Chapter One, the present study does not encompass cases in which individuals refuse orders that they perceive to be immoral but are lawful. Currently, many such cases involve refusals of orders which, perceivably unnecessarily, risk the well-being of one's own troops for operations, such as the Dutch commander who refused to obey orders he believed

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<sup>163</sup> For example, as seen in Chapter Five, Warrant Officer Hugh Thompson is a well-known example of military personnel, who risked both his own and his comrades' well-being to intervene and save civilians from being killed by his fellow U.S. soldiers in My Lai. For more on the massacre, see Chapter Five.

to unnecessarily risk the lives of his 24 subordinates in 2008 in Afghanistan.<sup>164</sup> Commanders bear responsibility for soldiers, and even though soldiers do risk their lives in battle-space, casualties have to be avoided at all costs. In such cases, even though commanders' actions were motivated by conscientious reasons, these cases were not as relevant for the present study, as they did not disobey orders that were illegal as such. While the author uses such cases to demonstrate the behaviour of commanders, ultimately the sole focus is those situations where members of the military refuse to obey orders because they would otherwise commit crimes, not in order to save their subordinates' or their comrades' life.

Before considering an individual's behavioural response to such a command, in the first instance, the soldier in question must recognise that the order that was given was either illegal, or at least, wrongful, without necessarily being aware of the legal reasons. It suffices that the individual experiences revulsion and resistance to the command. As discussed in Chapter Three, appropriate moral comprehension or competence is necessary, but insufficient for inducing moral actions. For example, knowing that smoking causes cancer does not stop smokers from smoking. If the individual genuinely does not perceive the order to be wrongful, he or she will not consciously disobey. They may in such instances nonetheless still disobey for other reasons, such as, for example, because they hate their superior, had a bad day or are a non-obedient individual all together. Such forms of disobedience are not relevant to the study.

Therefore, after an illegal order has been given, the subsequent assumption and necessary condition in the scenario is that the soldier does not want to obey the order, because they perceive the order to be "wrongful" (or even illegal). The taxonomy of responses presented here is based on an extensive review of both academic literature and media, and serves as lens through which cases of conscientious disobedience can be understood and explained.

#### **4.3. Immediate responses to illegal orders (*stage 1*)**

Three Nazi company commanders received the illegal order to execute the Jewish population in their respective districts in Belarus in 1941. One of them, lieutenant officer Hermann Kuhls, immediately carried out the order. The second, lieutenant officer Josef Sibille, directly refused to execute the order. The third, captain Friedrich Noell, requested the order in writing before he was willing to execute it (Wette, 2004). These three immediate courses of action represent the options soldiers can choose to take immediately after they have received an illegal order. See Figure 5 above for a schematic representation of these options.

In order to further illustrate the possible immediate responses of soldiers, the case of the Order Police Reserve Battalion 101 will be discussed. In July of 1942, its members were instructed to execute unarmed civilians in Jósefów, Poland. The case serves as an expedient

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<sup>164</sup> See documentary: Befehl ist Befehl, see reference list of internet sources.

illustration, as there is information about the battalions' responses in the form of 125 testimonies from perpetrators and bystanders. There are two studies on Order Police Reserve Battalion 101, namely Browning's (1992) *Ordinary Men* and Goldhagen's *Hitler's Willing Executioners* (1996). Both authors rely on the same data set (located at the Central Agency for the State Administrations of Justice at Ludwigsburg, Germany), and, hence, report the same number of respective responses. Both scholars agree that the men represented ordinary middle-aged Germans at the time, but ascribed different reasons as to why so few Germans refused to execute civilians. Browning concludes that it was simply "beyond most men" of Reserve Battalion 101 "to step out and act in a nonconformist manner", and that it was easier for them to shoot (Browning, 1992, p. 184), an argument which is in accordance with Bandura and Kelman's moral disengagement theory. Goldhagen, by contrast, argues that German culture was virulently anti-Semitic and, as such, the motivated executioners had simply found a way to unleash their hatred against the Jews (Goldhagen, 1996, p. 9).<sup>165</sup> Or, phrased otherwise, Goldhagen can be said to adopt a more dispositional stance as opposed to an interactionist one towards the behaviour of the perpetrators. Both explanations, in some cases combined, can help explain the participation in the crimes.

Although the behaviour of the members of a reserve police battalion serves as an expedient illustration of responses, it does not offer any detailed explanations for soldiers' behaviour. Most importantly, when the commanding officer, Major Trapp, forwarded the order to his subordinates, he himself not only clearly showed his own disagreement with the order, but actually offered older police officers the possibility to step back from carrying out the order to execute roughly 1500 unarmed women, children and elderly (Browning, 1992, p. 57).<sup>166</sup>

In the initial moments following the announcement of the order, ten to twelve members of the roughly 500 men police battalion (2%) stepped forward and refused to carry out the order. Hence, the majority of his subordinates accepted carrying out the orders. There are others who, when it came time to execute the order, did not carry out the order at a later stage, which Browning estimated to be no more than 10-20% of the Battalion (Browning, 1992, p. 159). The subsequent sections examine the three immediate responses in *stage 1* in greater detail. In particular, it will be demonstrated in how far the conscientious responses differ from each other and which actions fall under which form of disobedience. In the first section, the response of obedience is explained because it constitutes an element of the taxonomy as soldiers might first obey, and then choose to disobey, or reversed.

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<sup>165</sup> For example, Goldhagen proposed calling the perpetrators of the Holocaust by their real name: not Nazis, not SS soldiers, but "Germans". (p.6) He continues: "German's anti-Semitic beliefs about Jews were the central causal agent of the Holocaust". Goldhagen has been criticised by historians, not only for his tone of writing but also for his lack of application of scientific standards (see, for example, Browning, p.192).

<sup>166</sup> Firstly, all Jews were rounded up on the market so that they could be separated, while all the men suitable for work were deported.

### 4.3.1. Obedience

Not successfully defying orders, or demands from an authority, as discussed in Chapter Two, is not only a predominant response to a demand from an authority figure in people in experimental settings, but obedience to orders also constitutes an institutionalized mandatory form of conduct within the military, as outlined in Chapters One and Three.<sup>167</sup> As delineated in Chapter Three, the institutional environment, the indoctrination process and exposure to the battlefield solidify external social influences and increase soldiers' levels of obedience and conformity. On top of the general duty to obey orders from a superior, the decision to disobey an illegal order may bring about immediate punishment, such as summary execution. Whether the expected consequences of disobedience affect soldiers' decision-making in situ might impact the decision to obey or disobey, for the simple reason that, as seen in Chapter Two, in Asch's studies, conformity decreased when people were made aware of the fact that they would have to defend their position later.

In most military units where illegal orders are given, soldiers not only face the legal consequences for disobeying, but are also at risk of suffering direct physical punishment, even execution. A recent example of this is the reported execution of roughly 130 Libyan soldiers who refused to shoot demonstrators.<sup>168</sup> The most drastic consequences are to be expected in situations where genocide or other international crimes became the (un)official policy. For example, in Nazi Germany, a number of soldiers who did not want to go along with the atrocities were instructed to "line up with the Jews".<sup>169</sup> The perception that death was the only alternative was also reported by subordinates of captain Wohlauf, deputy commander of Reserve Battalion 101, who supposedly threatened refusers of mass executions that they could lie down in line with the victims instead (Browning, 1992, p. 62). Whether Wehrmacht soldiers or other members of state law enforcement actually would have been killed is heavily disputed (Jäger, 1982). However, irrespective of this, they may have felt that, inter alia, it was their duty (what Browning refers to as "putative duress", p. 170) not to let their comrades down (Browning, 1992, p.184). It is important to stress however, that the number of Wehrmacht soldiers who were prosecuted for disobedience and were subsequently executed amounted to over 30,000 (Haase & Paul, 1997), and if a disobedient soldier is executed, he can no longer share his story.

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<sup>167</sup> While the percentage of soldiers who obey illegal orders is and will perhaps always remain unknown, there are some indicators, such as, for example, the percentage of members of the Order Police Battalion 101 who *chose* to carry out an illegal order to execute unarmed civilians in Józsefów, despite being presented with the opportunity to step back from the executions. As aforementioned, the fact that Major Trapp offered his subordinates this chance to step back from carrying out the order is particularly unique, as "Trapp's distress about the order was not a secret to anyone" (Browning, 1992, p.58-59). In Milgram's experiments, the rate of obedience dropped significantly when two authorities gave contradictory demands (see Experiment 15 – obedience dropped from 65% to 10%) (Milgram, 1974, p. 97). In situations where a superior does not offer subordinates with an alternative request, the rate of obedience is expected to be higher.

<sup>168</sup> See, for example online news articles in the reference list of internet sources.

<sup>169</sup> Historically, disobedience (during hot situations) was punishable by execution, and in situations where there was no time for due process, the execution would be conducted on the spot (see, for example, Osiel, p. 52, but also German Wehrmacht soldiers who refused during World War II were largely executed on the spot).



One would expect that some superiors who issue an illegal order would not refrain from taking other illegal actions, such as drastic summary punishments. The more illegitimate the regime, the more likely refusals might also trigger illegitimate consequences. At the same time, Jäger (1982) and many other scholars argue that the actual consequences of disobedience were not always as dire as one would expect. Even if the order and the expected consequences of refusing are not obviously illegal, most individuals tend to go along with it and perpetrate the crimes they are instructed to. In some cases, the individual may not realise the illegality of the orders. Ordinarily, an individual does not find themselves suddenly in a situation in which they are confronted with a (manifestly) illegal order.

Staub referred to the gradual process of continuing to go along with illegal demands as steps along a continuum of destruction (Staub, 1989). Obedience to an authority demanding unjust or illegal deeds is often accompanied by an activation of the individual's moral disengagement mechanisms, as discussed in Chapters Two and Three. Given that people prefer to maintain a positive self-image, one's own involvement is invariably rationalised, normalised and justified (Kelman & Hamilton, 1989). Indeed, in Germany, the laws that made the Holocaust possible were introduced gradually.<sup>170</sup> Once in combat, soldiers are also exposed to increased harm and suffering and are likely to rely on a range of defence mechanisms, such as routinisation (or, more appropriately, brutalisation and the de-humanization of victims) to cope with the stress. Yet, some soldiers refuse to obey illegal orders.

### **4.3.2. Direct disobedience**

If a soldier chooses to disobey an illegal order for conscientious reasons, she or he can directly confront their superior and openly refuse to carry out the illegal order. When Lieutenant Buchmann learned about what Reserve Police Battalion 101 had been ordered to do, he let his direct superior immediately know that as “a Hamburg business man and reserve lieutenant, he would in no case participate in such an action, in which defenceless women and children are shot” (Browning, 1992, p. 56).<sup>171</sup> Of course, Buchmann had the benefit of time when he refused to carry out the illegal order, as he was informed about the order the night before. His comrades only learned about the upcoming task the next morning and had to decide there and then in front of the entire battalion whether they were going to take part in the executions. Upon Trapp's invitation for older members to step forward and be assigned

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<sup>170</sup> As elucidated in Chapter Two, the “foot-in-the-door” process enhances people's tolerance of increasingly inappropriate demands, which was also shown in Milgram's experiments, inasmuch as he began by asking his subjects to administer a 25-volts shock, which was not harmful (Freedman & Fraser, 1966). However, a 450-volts shock would be considered illegal, because it would be lethal. As aforementioned, the crossing of a certain line, which in the Milgram experiment was the administration of a 150-volts shock, constitutes a point of no return for people. In the military, this foot-in-the-door process is institutionalised, as soldiers are socialised to become accustomed to violence in order to overcome their natural resistance to shooting and killing (Grossman, 2009).

<sup>171</sup> Lieutenant Buchman and his platoon were assigned a different task on the day of the massacre. His superior, First Lieutenant Hagen, already informed Buchman of the task the previous evening. Hagen did not mention to the first company commander, captain Wohlauf, the reason for Buchmann's reassignment (Browning, 1992, p. 56).

a different task, ten to twelve men stepped forward. The first of these men was Otto-Julius Schimke; his company leader, Hoffmann, was appalled that one of his subordinates had stepped forward first (Browning, 1992, p. 57). A number of men later approached their respective superior in order to be relieved from the burden of executing civilians; depending on who was in charge of the respective group, some of the conscientious policemen were later excused from service, including, for example, Hans Dattelman of Lieutenant Drucker's Third Platoon of the Second Company (Browning, 1992, p. 62).<sup>172</sup>

Other known cases of direct conscientious disobedience from Nazi officials to refuse illegal orders include the case of lieutenant Reinhold Lofy, a twenty-year-old Wehrmacht soldier. He was ordered to execute an elderly Jew, which he refused to do, because, as Lofy stated, as a Christian, he was unable to follow the order (Wüllner, 2002, p. 105). This incidence of disobedience brought no consequences for Lofy. However, when Lofy later refused to carry out another order for conscientious reasons, he was prosecuted and received a life sentence (Wüllner, 2002, p. 109).<sup>173</sup>

Earlier in this chapter, it was alluded to the disobedience of officer Klaus Hornig, who refused orders to take part in executions.<sup>174</sup> During Hornig's witnessing of the mass-murder, he was unable to contain himself and yelled that the "GPU methods<sup>175</sup> had to be stopped" (Überschär, 2004, p. 86). Hornig was transferred to Frankfurt am Main, and eventually suspended due to his subsequent interventions, which classified him as having an "SS and police hostile attitude" (Überschär, 2004, p. 87). There, Hornig was accused of an array of charges, including attempting to prevent the execution of orders, being friendly with the Polish population, open criticism of Himmler's policies, enforced disobedience and instigation of his subordinates, among other crimes (Überschär, 2004, p. 87).<sup>176</sup> While Hornig knew and referred to the law as a jurist and believer, other soldiers' conscientious disobedience was based more on the perceived wrongfulness of the order itself.

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<sup>172</sup> First Sergeant Kammer of First Company was sympathetic towards those subordinates who found the task repugnant, as opposed to his company commander Wohlauf. Browning wrote that those who knew Kammer well, used their connection with him. A couple of police men who approached captain Wohlauf instead of Kammer, were asked to lie down next to the victims if they did not feel up to the task (Browning, 1992, p. 62). Lieutenant Drucker was also more open-minded towards men who could not participate (Browning, 1992, p. 66). The authority figure is therefore likely to impact on soldiers' (successful) conscientious disobedience, which will be discussed further in section 4.5.

<sup>173</sup> This time the order he conscientiously disobeyed would have "sacrificed his own troops for no good reason" (Wüllner, 2002, p. 108).

<sup>174</sup> Hornig, in fact, requested a disciplinary investigation into the legality of the orders and asked to be removed from the execution tasks; his men were actually tasked with securing the area instead of shooting, and, in the first instance, Hornig's superior refused the investigation and stated that Hornig better adapt himself to such tasks (Überschär, 2004, p. 85).

<sup>175</sup> Hornig is referring to the State Political Directorate (also translated as the State Political Administration) or the Soviet Secret Service. The Nazi Propaganda film "GPU" was released shortly after his refusal, in 1942.

<sup>176</sup> Hornig never saw his own indictment; rather, he was prosecuted according to a special SS and Police jurisdiction. (ibid.) After several months of incarceration at the police prison, he received the final verdict of 2,5 years imprisonment. He was rearrested (for intercepting Russian radio) and deported to the concentration camp Buchenwald in July 1944, where he remained (during the course of additional litigations) until being freed by the Allies on April 11<sup>th</sup>, 1945. Hornig was a frequent witness in future trials and was often referred to as an example of how disobedience was possible under the Nazi regime (Kitterman, 1988; Überschär, 2004).

Both, Lofy and Hornig are examples of individuals who conscientiously disobeyed orders in different situations. However, not all individuals who refuse to obey an illegal order will also (successfully) disobey every other illegal order. A well-known example of an unsuccessful attempt of a direct refusal is the case of Bosnian Croat soldier, Drazen Erdemović, whose case has already been presented in the Introduction of this book.<sup>177</sup> On July 16<sup>th</sup>, 1995, his unit, the 10<sup>th</sup> Sabotage Detachment, were tasked by General Ratko Mladić with executing around 1,200 Bosniak men and boys aged between 17 and 60 years, who had surrendered to the Bosnian Serb police or army. The prisoners were transported to a farm near Srebrenica and gunned down in groups of ten. Supposedly, when Erdemović directly confronted his superior, he received the following response: “If you are sorry for them, stand up, line up with them and we will kill you too”. Erdemović further stated during his hearing at the International Criminal Tribunal for the Former Yugoslavia that: “I am not sorry for myself, but for my family, my wife and son who then was nine months, and I could not refuse because then they would have killed me.”<sup>178</sup>

That same afternoon, after the executions at the farm were completed, Erdemović and his comrades were sent to a nearby public building in a town where more executions were to take place. Once again, Erdemović reported that he refused to shoot, only this time three of his comrades apparently agreed with his refusal, and the order was rescinded (albeit the victims were shot by other soldiers) (Newman, 2000, p. 161). Two important lessons can be drawn from these reported incidents. Firstly, how superiors respond to a refusal depends on the authority in place, as we saw with Wehrmacht officers. In these aforesaid examples of conscientious disobedience, there were no apparent immediate dire consequences. Secondly, the case of Erdemović shows how the support of comrades can help to make a refusal successful. However, Erdemović claimed that he was later attacked as a consequence for his disobedience.<sup>179</sup>

As discussed above, the present research does not primarily focus on orders to abstain from actions that protect civilians, yet, the following example of such a situation is briefly described in order to demonstrate a known recent case of conscientious disobedience. U.S. captain Rockwood was deployed as an intelligence officer to Haiti in 1994 as part of “Operation Uphold Democracy”, where he attempted to obtain permission to inspect the National Penitentiary. He had received strong evidence about inhumane conditions, torture and murder at the facility (Wrage, 2002). Ultimately, his superiors did not allow Rockwood to take any action, but the captain chose to break the chain of command. He did so as he felt it was his duty to do so, and justified his actions by arguing that they fell under the broader mission goal outlined by then President Clinton in a speech on September 15<sup>th</sup> 1993 to “end

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<sup>177</sup> While Erdemović is known for having come forward to the trials voluntarily, interestingly, Erdemović volunteered to become a witness and testify against Mladic and Karadzic (but not against his own wrong doing). His testimony got him indicted as well (he may have not seen that coming). See: Erdemović Trial Transcript of May 31<sup>st</sup> 1996, p. 123.

<sup>178</sup> For references, please see: Erdemović Trial Transcript of May 31<sup>st</sup> 1996, p. 32.

<sup>179</sup> “Trial Chamber Judgment, Prosecutor v Erdemović,” 1997.

human-rights-abuses” (NewYorkTimes, 1995). In the eyes of the U.S. military, Rockwood clearly acted outside his authority and was accordingly court-martialled.<sup>180</sup> Yet, Rockwood disobeyed his orders because his conscience would not allow him to obey, and, hence, he can be considered as an example of conscientious disobedience.<sup>181</sup> “I don’t just follow orders. I am an American officer, not a Nazi officer” are the words that the captain espoused in response to questioning about why he disobeyed direct orders.<sup>182</sup> Rockwood said the orders were incompatible with his conscience, his humanitarian duty and his perception of international law (Wrage, 2002).

The powerful environmental and psychological forces that explain why most people obey illegal orders can help us understand why disobeying illegal orders might come at a high personal cost. Laboratory experiments on obedience to authority have shown that the earlier a person objects to a demand from an unjust authority, the more likely the person is to refuse overall (Modigliani & Rochat, 1995). This process is complimented by the “foot-in-the-door technique”, whereby a person goes along and accepts demands from someone else because they did not object earlier, often because the demand was so benign (Freedman & Fraser, 1966). Both paths of continuation suggest that people have a tendency to complete the path they have chosen or that they find themselves on.

The example of Erdemović raised the question of the duty to disobey illegal orders under duress (van Sliedregt, 2012). Even though the study does not reflect on the normative duty in great detail, Walzer wrote that “The War Convention requires soldiers to accept personal risks rather than kill innocent people” (Walzer, 1977, p. 305). In other words, when a soldier receives an illegal order (and here it does not even have to be manifestly illegal), Walzer argues that the requirements of his profession are that he should rather choose to die than to perpetrate an illegal deed. One could argue that, even under duress, when a soldier’s own life is threatened, a soldier should disobey. The fact that examples such as the ones above exist highlight the importance of the consequences of conscientious disobedience. Interestingly, expert opinions on the consequences of direct disobedience vary considerably: as aforesaid, some scholars argue that even the Nazis did not always punish disobedience to illegal orders harshly (Kitterman, 1988), while others report that at least 30,000 Wehrmacht soldiers were executed for disobedience (Haase & Paul, 1997).

Conscientious disobedience in the military is thus an oxymoron, in that it is virtually not accepted, and soldiers are unlikely to win in a court case, should things go that far. Even though, on paper, the manifestly illegality rule exists, it is unlikely that any army would admit that manifestly illegal orders had been given by their officers. In theory, command

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<sup>180</sup> Rockwood’s superiors feared that an intervention at the penitentiary might endanger the success of the overall mission of facilitating the transition to democracy. It is for this reason that the case is routinely used as a case study for ethical dilemmas and as an example of how not to react at the U.S. Naval College (Pierce, 2002).

<sup>181</sup> While the legality of the order Rockwood received was contentious, but, as the U.S. military insists, not illegal, one could also argue that under certain circumstances, the omission to save civilians on a humanitarian mission may be considered illegal (Hartle, 2002).

<sup>182</sup> See: Newsweek online, 22 November 1999, “A question of Duty” last accessed March 2015.

responsibility makes those individuals who are higher up the chain of command responsible for actions committed under their authority. In practise, when illegal orders are given, careful phrasing of orders may allow superiors plausible deniability while enlisted soldiers at the end of the chain of command remain criminally liable. By contrast, soldiers who evade obeying illegal orders, as discussed next, do not commit crimes.

#### **4.3.3. Indirect disobedience**

The third possible response to an illegal order in *stage 1* is indirect disobedience or evasion: this involves a circumvention of having to confront the superior immediately and directly, as well as a circumvention of obeying the order. As discussed in Chapter One, in the military organisation, any non-execution of an order constitutes disobedience. Evasion here, constitutes a subcategory of disobedience, which includes all behaviours other than directly refusing to obey. Evasion encompasses forms of disobedience such as, for example, “buying time” by asking for a clarification or a written order, pretending to have misheard the order, pretending to be sick or otherwise physically unable to carry out the order, agreeing to carry out the order but not actually doing it, ignoring or burning the order, running away (and later desert), and harming or killing oneself. As opposed to direct disobedience, indirect disobedience has a chance of remaining unnoticed and unrecorded, and therefore the disobedience will not be punished.

By contrast, if caught, a soldier may be punished for disobedience, but if the individual does not get caught, they have the chance of getting away with it. Technically, if time permits it, the soldier could also request to be formally relieved of their duty, which the superior by no means has to grant (Osiel, 1999, p. 51). In reality, superior officers may be far more likely to punish the subordinate on the spot. Conscientious evasion is thus a creative way of avoiding direct confrontation with the superior, as well as possibly avoiding subsequent punishment and execution of an illegal order.

As discussed in Chapter Two, this type of evasive behaviour was also observed in Milgram’s Experiment 7: when subjects were believed to be unsupervised, they gave lesser shocks to the supposed victim than they had been instructed to and the obedience rate dropped to 20% (Milgram, 1974, p. 60) and roughly 25 % attempted to help the “learner” by giving clues or by barely pressing the shocking lever. While evasive behaviour in the military, especially when done directly, might be difficult to track and systematically study, it is certainly a far from unknown phenomenon.

One classic, routinely cited study examined the ratio of US “non-shooters” in World War II, and concluded that 20% of infantry men never actually engaged their weapons despite having had the chance, because they had not successfully overcome their humane aversion to killing (Dyer, 2004, p. 54; Grossman, 2009, p. 31; Marshall, 1947, p. 54). At the same time, most soldiers reported that they thought their comrades were in actual fact shooting (Marshall,

1947, p. 52). This pretending to shoot, while not actually shooting, represents perhaps the paradigmatic form of conscientious evasion. While Marshall's research methods have been the subject of critique, his general observations remain relevant (Smoler, 1989) and as suggested here, deserve more attention with regards to constituting a viable response to illegal orders.

Samual Oliner, a Holocaust survivor and now a leading scholar on altruistic behaviour, was drafted into the U.S. Army and subsequently deployed to Korea in 1952, where he and his comrades were ordered to stop an escalating prison riot.<sup>183</sup> When Oliner was ordered to shoot prisoners at point-blank range, he recounted: "... I knew it was wrong. Though the prisoners were rioting, they did not have any weapons and could have been subdued by other means—with tear gas, for example. I did not fear for my life. Instead of firing point-blank, I fired above their heads" (Oliner, 2003, p. 115). Oliner's evasion was noticed by his superior, who yelled at him and kicked him from behind, before later allocating him the additional task of supervising the prisoners who had to transport the wounded and dead inmates (*ibid.*).

Indirect disobedience was also reported by some of the policemen of Battalion 101. Browning described how in order to avoid taking part in the executions, some members simply hid in the Catholic priest's garden near the town square, before jumping on a truck (Browning, 1992, p. 62). Yet, others did not take part in rounding up people and stayed at the market place, while some took their time searching houses, in the hope of not being assigned to a firing squad (Browning, 1992, p. 63). Conscientious evasion can thus only be considered as such, if an individual has moral reasons for their refusal. If some of these individuals evaded obeying their orders because they felt lazy that day, while having no moral objections towards the order whatsoever, then their respective responses would not constitute conscientious evasion, but rather simply be evasive behaviour.

101 Battalion member Gustav M. managed to avoid taking his turn shooting all together, stating that it was possible to stay out of it: "It could not be avoided that one or another of my comrades noticed that I was not going to the executions to fire away at the victims: they showered me with remarks such as 'shit-head' and 'weakling' to express their disgust" (Browning, 1992, pp. 65-66). He continued with his testimony: "But I must mention here that I was not the only one who kept himself out of participating in the executions" (*ibid.*).

Conscientious evasion can also occur after individuals initially obey illegal orders. "I myself took part in some ten shootings, in which I had to shoot men and women. I simply could not shoot people anymore, which became apparent to my sergeant, Hergert, because at the end I repeatedly shot past. For this reason, he relieved me. Other comrades were also relieved sooner or later, because they simply could no longer continue" (Browning, 1992, p. 65). Similarly, Zorn, whose first victim's skull was ripped off with parts of it flying into his

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<sup>183</sup> Samual P. Oliner is now Emeritus Professor of Sociology at Humboldt State University and Founder/Director of the Altruistic Personality and Prosocial Behavior Institute.

superior's face, stated "I had become so sick that I simply couldn't anymore." (Browning, 1992, p. 67). Kastenbaum reported in his testimonies that after having shot three victims: "the shooting of the men was now so repugnant to me that I missed the fourth man. It was no longer possible for me to aim accurately. I suddenly felt nauseous and ran away from the shooting site, into the woods" (Browning, 1992, pp. 67-68).

Browning also reported that another member of the firing squad "slipped off" after two firing rounds and hid among the trucks at the edge of the forest (Browning, 1992, p. 65). Niehaus also requested not to participate after having shot the first victim (an elderly woman) (ibid.). Kageler, after participating in the first round, encountered and talked to a (German) mother and child that he was instructed to shoot, but "I took the decision not to participate any further in the executions" (ibid.).

With respect to these examples of responses from Reserve Battalion 101 to an illegal order, manifold forms of evasive, or indirect disobedience were recorded. Some policemen got sick, which could have been either pretending to be sick or been a real nervous break-down. Other members shot past the victims, which again, can be deliberate or unintentional, while others hid in places or took their time carrying out other tasks. Browning estimated that the total "drop-out rate" was 10 % to 20 % of the battalion (Browning, 1992, p. 159). It should in this regard be noted that because the firing squads took turns and the units were mixed, this increased the likelihood that conscientious evasions remained unnoticed by superiors, because no strict control was carried out, and, as aforesaid, some superiors were open-minded about individuals' conscientious evasion, such as the battalion commander.

#### 4.4. Delayed responses to illegal orders (*stage 2*)

After having delineated the three possible immediate (or slightly delayed) responses to having received an illegal order, delayed responses are considered next. Irrespective of how an individual has responded in *stage 1*, a person has more possibilities to take conscientious action in a delayed form in *stage 2*, as the individual is further away or removed from the situation in which they have received an illegal order (see Figure 6).

When applying *stage 2* responses to the earlier mother-son analogy, one might consider how the son copes with his mother's request later. Irrespective of whether the son cleaned his room in *stage 1*, whether he confronted his mother or took evasive action, the son could, inter alia, pretend and make himself and others believe that his mother never asked him to clean up the room, simply never think about it again, or refuse to be asked about it, which would be tantamount to denial. Or, the son could simply run away. We will now look at these main respective responses in the context of soldiers who have received illegal orders.<sup>184</sup>

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<sup>184</sup> In the aftermath, there may be manifold options to "deal with the past" such as talking to friends, a minister or a mentor, but since these options will not affect the son in the situation again, these are excluded from the analogy. Similarly, soldiers can also take numerous actions, such as whistle-blowing, for example, which are left out of the

These responses comprise additional ways for soldiers to take a course of action based on their conscience, at a time when they are no longer directly confronted with the task of carrying out the illegal order. This second stage of conscientious disobedience is not a necessary continuation of the first stage; in fact, a soldier may never enter this stage.

Returning to our mother–son analogy, the second stage requires us to disregard what the son has done in *stage 1*; either, he first cleaned up his room, told her he was not going to, or pretended that he cleaned up, while in actual fact, he did not. Even in this hypothetical scenario, one can already see how the initial response of the mother in real life is likely to have a crucial impact; however, this dimension will be left out of our demonstration for the sake of focusing on describing the son’s behaviour. We will consider two possible delayed responses: firstly, the son removes himself from the family home without informing his mother (desertion), or secondly, he argues with his mother about the fact that it should not be his job to clean up the room (conscientious objection). These two possibilities will be discussed vis-à-vis soldiers’ situation, citing examples of individuals who have taken such courses of action in various situations.

#### 4.4.1. Conscientious desertion

A Wehrmacht fusilier, Stefan Hampel, wrote about his desertion in his diary: “during this vacation I experienced an event that directly caused me to do my deed” (i.e. his desertion) (Oleschinski, 2004, p. 53).<sup>185</sup> Even his handwriting was notably impacted by the shocking incident in which he described witnessing the mass murder of around 2000 Jewish civilians in May 1942 in Vasilishki, Belarus, which ostensibly represented the decisive turning point in his decision to desert from the Wehrmacht one month later (Oleschinski, 2004, p. 53). Despite Hampel not being ordered to participate, his statement is nevertheless illustrative of conscientious desertion, in that it was his conscience that motivated him to desert. However, it is extremely difficult to link desertion directly to an illegal order, as invariably the individual will have a multitude of reasons behind their desertion, including, for example, losing friends or comrades, having doubts about the legality of the war, being subjected to harassment by others, fearing death or simply missing one’s family (Shils, 1977; Wenzke, 1998, p. 260). Desertion is a complicated and consequence-loaded exit strategy for an individual due to the fact that it constitutes a crime in itself, especially for soldiers who hold crucial information about the war.<sup>186</sup> Desertion can begin right away in a situation, in which case the person would evade or disobey at *stage 1*. Once a soldier has deserted, he or she will not be able to return to their home country. They will put loved ones in difficult situations and must live in refuge and fear of getting caught.

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response, as the study only came across individuals who witnessed crimes, but who were not themselves ordered, unless they filed complaints with their superiors. In that case, their behaviour would fall under direct disobedience. Having said this, whistle-blowing is certainly a related conscientious response to illegal or immoral conduct.

<sup>185</sup> Referring to his desertion. The text is translated by the author and can also be found in Oleschinski (2004).

<sup>186</sup> Desertion also used to be punishable by death and continues to have harsh consequences to this day.



When a soldier is no longer directly in the situation in which they were given the illegal order, they can desert from the armed forces in order to avoid being instructed to commit further illegal actions. Desertion, as a response to an illegal order, can take place after an individual has obeyed an order, after they have directly or indirectly disobeyed. Desertion can even occur if the soldier has not been given the order, as in the case of Hampel. The number of deserters in the Wehrmacht is unknown, especially the number of those individuals who deserted solely for conscientious reasons, rather than because they were afraid of killing, dying, or because they missed their families. However, some generally accepted estimations report that the amount of German Wehrmacht deserters was in the six digits, of which 35,000 Germans were caught and prosecuted, with 65% of these subsequently being executed (Knippschild, 1998, p. 224). Of the many who deserted, it can be assumed that Stefan Hampel was not the only one who had conscientious reasons for deserting.

Conscientious desertion can also occur in cases where individuals believe a war to be illegal, or when the way the war is fought offends their conscientious beliefs. For example, Joshua Key deserted from the U.S. Army after he had been deployed to Iraq, where he witnessed abuses of the local population (Key & Hill, 2007, p. 84). “My supervisors made no distinction between civilians and combatants” (Key & Hill, 2007, p. 8). According to Key, all Iraqis were viewed as terrorists. Key did not interfere as he was worried about the consequences of doing so (being yelled at and losing some of his pay), hence: “The simplest thing I could do was to keep my mouth shut and stay out of trouble, so that is what I did” (Key & Hill, 2007, p. 84). However, Key increasingly realised that he and his colleagues were wrong: “I came face-to-face with the indecencies of our actions in Iraq” (Key & Hill, 2007, p. 108), noting that he learned two lessons growing up on his grandparents’ farm in Oklahoma: “It was wrong to attack defenceless people” and “if you get into a fight, it would be utterly despicable to start kicking your opponent once he was down” (Key & Hill, 2007, p. 109).

The more Key observed the actions of U.S. soldiers, the more he thought about exit strategies, like shooting himself in the foot so that he could be removed from war and taken back home (Key & Hill, 2007, p. 130). After a comrade actually shot himself in the ankle, Key and his closest peers admitted to each other that they all thought about doing the same (Key & Hill, 2007, p. 131). However, Key’s superior, captain Bower, came into the soldiers’ sleeping area and informed the group that “any soldier who shot himself would be patched up in Germany and sent right back into action” (Key & Hill, 2007, p. 132). As a result, Key sometimes tried to get his arm in harm’s way, in order to get shot (*ibid.*). Another colleague who threatened to kill himself was sent home. While Key may have not received an illegal order, he claims that his conscience nevertheless drove him to desert from the Army while he was back home from a tour. The witnessing of the abuses of Iraqis alone are certainly a key driver of his desertion, but perhaps not the only driving factors.

When discussing motivations for conscientious desertion, it is instructive to revisit the example of Stefan Hampel. Hampel, who was half German and half Polish, was drafted into the Wehrmacht in 1940. Prior to this, he had been arrested and charged according to the 1934

Law against Treacherous Attacks on the State and Party and for the Protection of Party Uniforms for stating that Germany was seeking for causes to wage the war and for opposing the racist ideology of the SS (Oleschinski, 2004, pp. 52-53). He was thus willing to communicate his opposition despite the adverse consequences he would face for doing so. His dual-citizenship may have led to his opposition and eventual desertion, as he later stated in his diary: “this event affected me deeply, because I could not help but think of what the Russians would do to relatives of German soldiers, if they found out, what happened to their nationals.” (Oleschinski, 2004, p. 54). Therefore, we cannot know whether he was primarily motivated to desert out of not wanting to get into a situation in which he may be ordered to participate, or whether he was afraid of the possible retaliation of Russians.

The deserter Hampel hid for about a year under strenuous conditions in which he suffered mental and physical hardships, such as, for example, hunger-induced stomach inflammation for which he could not get treated due to his illegal status. In 1943, according to his own account, Hampel decided to flee to Switzerland in order to inform the International Committee of the Red Cross in Geneva about the mass murders (Oleschinski, 2004, p. 56). Again, this may not have been the sole motivation, as he would have had better life conditions in Switzerland. Either way, Hampel was arrested and sentenced to death. The sentence was changed to 15 years imprisonment.<sup>187</sup> In all cases of desertion, it is possible that the individual chooses to take this illegal course of action for more reasons than just their conscience and that therefore the response of conscientious desertion constitutes only part of the explanation of why individuals desert from the military.

#### **4.4.2. Conscientious objection**

Conscientious objection (hereafter also C.O.)<sup>188</sup> can generally be defined as a refusal to bear arms for moral or religious reasons (Moskos & Chambers II, 1993). Similar to the delayed response of desertion, a clear link between an illegal order and the application for the status of conscientious objector is not always easy to establish. Furthermore, there are numerous distinctions that must be made when including this particular behaviour in the present taxonomy. In most countries, the legal system distinguishes between selective and general (or absolute) C.O.; selective C.O. refers to the refusal to take part in military operations within the context of a specific (selective) conflict, while general C.O. corresponds to the total refusal to take part in war activities because of a general change of heart (or morals), which in many Western-European countries is increasingly secularised, and no longer grounded in religious faith (Moskos & Chambers II, 1993, p. 3).

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<sup>187</sup> He was re-recruited into a probation unit when the Germans became desperate. In 1945, he became a Soviet prisoner of war. Already in the camps, he made a career out of trading and black marketing, which he continued in Berlin after fleeing the camp.

<sup>188</sup> C.O. can technically be a form of preventative evasion: persons who refuse military service would not get into situations in which they have to execute illegal orders. However, this type of C.O. is not relevant here, as it mostly concerns individuals who reject military service altogether.

General or absolute conscientious disobedience is not as relevant here, in case a conscript applies for the status of conscientious objector before having been a member of the armed forces and because they generally oppose carrying weapons and war in general. In this case, the soldier does not respond to an illegal order. By contrast, for a soldier who has been deployed and then applies for the status of C.O., the soldier may be motivated to take this course of action after having received one or more illegal order(s) and in order to not find him or herself in this situation again. In some cases, the soldier may have a better chance of receiving the desired status, if they claim to be a general conscientious objector, rather than stating to be a selective objector. The link between conscientious objection and having received an illegal order is not easy to prove.

Technically, soldiers can apply for selective conscientious objector status, if they deem a certain conflict illegal. As discussed in Chapter One, when it comes to the lawfulness of the decision to enter a conflict, in many states, including the United States, soldiers have no right to refuse orders to deploy based on their perception of the lawfulness of the war.<sup>189</sup> The discussion on selective C.O. has been revived in recent years, with a marked difference in opinion about whether or not more militaries should include the right to selective C.O. (Ellner, 2014a). For example, Linn reports that Israeli soldiers who refused to support the (first) Intifada and the Lebanon War were motivated to change this “unjust situation” (Linn, 1996, 2002).

In line with what has been suggested by studying nonconformity and disobedience in Chapter Two, Linn found that her sample of selective refusers, in addition to having the moral courage to refuse and to be alone, were also less closely attached to their comrades in their respective units (Linn, 1996, p. 426). Interestingly, while these Israeli soldiers refused to take part in a – what they considered to be - immoral war, 37 % of the 92 refusers studied also feared that they would find themselves in a position where they would be obliged to carry out an immoral command (Linn, 1996, p. 427; 2002). Consequently, it is indeed possible that those individuals who oppose bearing arms in general, or who oppose specific wars, may also be more inclined to oppose individual orders than those who have no moral reservations regarding combat. The subsequent section combines elements from the previous chapters into a theoretical framework.

## **4.5. Toward a theoretical framework**

The above presented taxonomy of conscientious disobedience distinguishes between ways of how soldiers can disobey illegal orders. The present section combines the theoretical foundations laid in the previous chapters to propose a theoretical framework for understanding and explaining why soldiers refuse to obey illegal orders.

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<sup>189</sup> However, as we have seen in Chapter One: technically, the order to deploy to an outright illegal war, can be construed as illegal order.

The interaction of multiple factors from the legal-theoretical, social psychological, and institutional dimensions of the dilemma can contribute to the soldier's decision to disobey. As discussed in Chapter Three, the processes of authorisation, routinisation and dehumanisation are critical for understanding soldiers who obey illegal orders. In turn, in order to understand why a soldier disobeys under the same circumstances, it is proposed to explore to what extent and why these (moral disengagement) mechanisms may not have been activated by soldiers who refuse to obey.

For a systematic analysis of the situation in which the soldier faces the dilemma, it is proposed to start by looking at factors in the macro dimension, next, to examine the illegal order as such, then to analyse social forces in the meso dimension, and finally, to look at micro, or personal, factors that the soldier himself brings to the situation, as illustrated below in Figure 7. The subsequent section summarises how the processes in each dimension may influence the soldier.



*Figure 7 Three dimensions of the theoretical framework*

The macro dimension encompasses environmental factors the soldier operates in. The conflict in which the illegal order is given can play a crucial role in that violence against an enemy might be authorised. Furthermore, a closer look at the environment might also explain whether the political rhetoric may contribute to the de-humanisation of the enemy, see Figure 8. Above, it was explained that euphemisms, for example by referring to enemies as rats, as well as by using derogatory terms can contribute to the de-humanisation of victims.

Furthermore, the particular military training that a soldier may have received might add to the routinisation of violence (towards a certain victim) that originates in the macro dimension and is internalised in the micro dimension. Therefore, factors in the macro dimension can interact with personal factors in the micro dimension, for example when an individual adopts a rhetoric.

After studying the environment, the subsequent step should focus on an examination of the order itself. In particular, differences between sources of illegality can be explored as well as the differences in how military institutions approach the duty to disobey illegal orders. Aside from the fact that these legal elements may possibly lay beyond the grasp of the enlisted soldier, the order itself constitutes the stimulus that triggers the (dis)obedient response. The order in question, as well as the soldier's legal requirement regarding obedience in the respective military institution at that time contribute to the authorisation of violence.

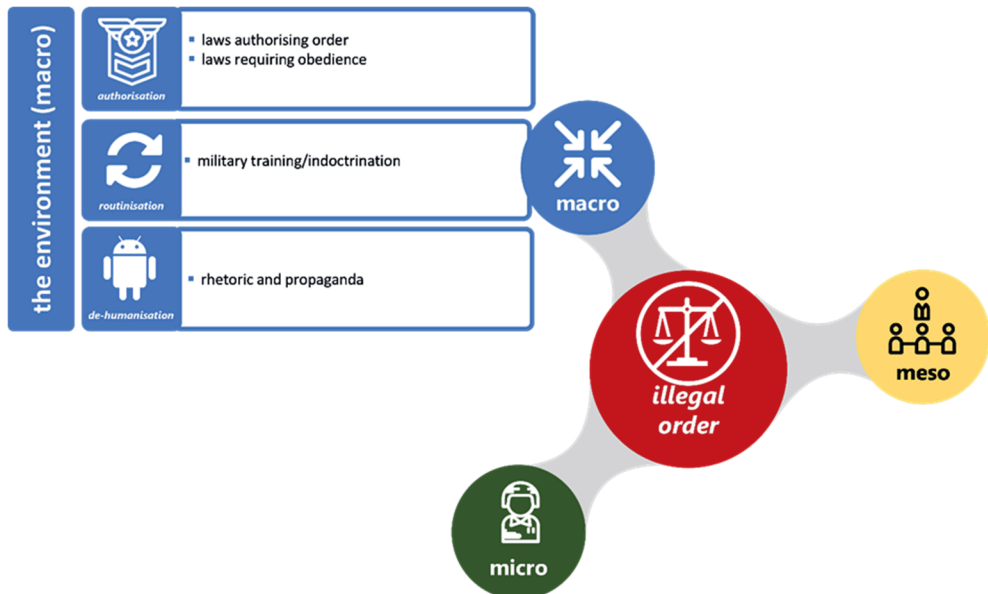


Figure 8 Factors in the macro dimension (environment)

Secondly, in the meso dimension, social forces can further hinder or enhance a soldier's disobedience. The meso dimension comprises social factors interacting with and impacting

the individual's perception of the illegal order and their cognitions about the situation. In particular, as suggested by the findings in social psychological research of Chapter Two, one should look at the role played by the superior and comrades. For example, if the superior does not support the illegal order, as seen above in the example of Major Trapp, such circumstances might allow room for disobedience. In other cases, if the superior is not present, the individual soldier might indirectly disobey. The relationship between the superior and the (dis-) obedient soldier may also contribute to the soldier's decision-making: if they fear their superior they might respond differently than if the superior is admired or identified with, as suggested by the experiments discussed in Chapter Two.

In the meso dimension, the behaviour of comrades as well as the dynamic of the group can possibly enhance the processes of authorisation, routinisation and de-humanisation. As discussed in Chapter Three, battle-space experience might change what is perceived to be "normal" by soldiers, especially when soldiers are exposed to escalating violence. Such a routinisation of violence is further enhanced if the peer group of the soldier is directly involved in or affected by violent acts. As discussed in Chapter Three, the comrades of the soldier are an important point of reference: if the soldier wants to belong to the group, he or she might adopt the behaviour and chooses to conform. At the same time, the group dynamic is also impacted by the soldier's personal position in the group. As discussed in Chapter Two, for example, a leader or "independent" individual, who has a strong or positive self-image is more likely to stand up to a group, see Figure 9.

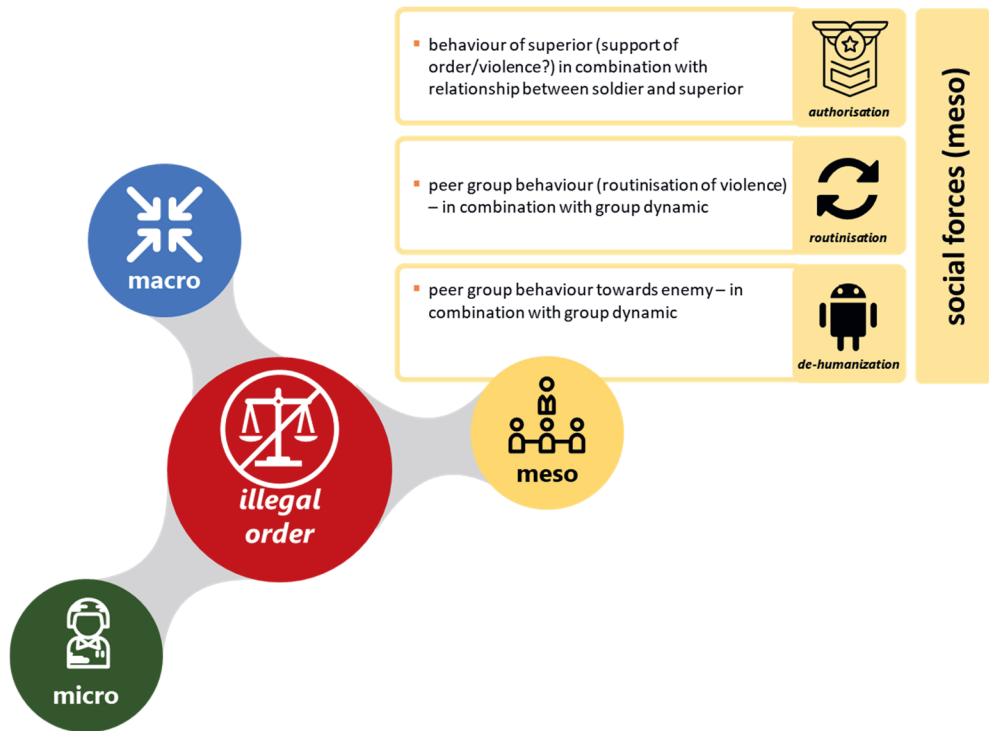


Figure 9 Factors in the meso dimension (social)

Finally, it is paramount to incorporate personal factors in the micro dimension that interact with factors in the other dimensions and that have significant impact on whether an order is recognised as illegal and why a soldier may feel empowered to disobey. As has been alluded to above, the soldier's self-identity might play a crucial role. Furthermore, research on obedience and conformity suggests that an individual's cognitions or cognitive abilities and possible personal experiences influence to what extent the soldier activates moral disengagement mechanisms. Along the lines of explanations for disobedience and nonconformity in the experiments, the present theoretical framework suggests to include possible personal factors and search for what may have been the disobedient soldiers' self-image, how he or she may have perceived the situation, and how they might explain their own behaviour, see Figure 10.

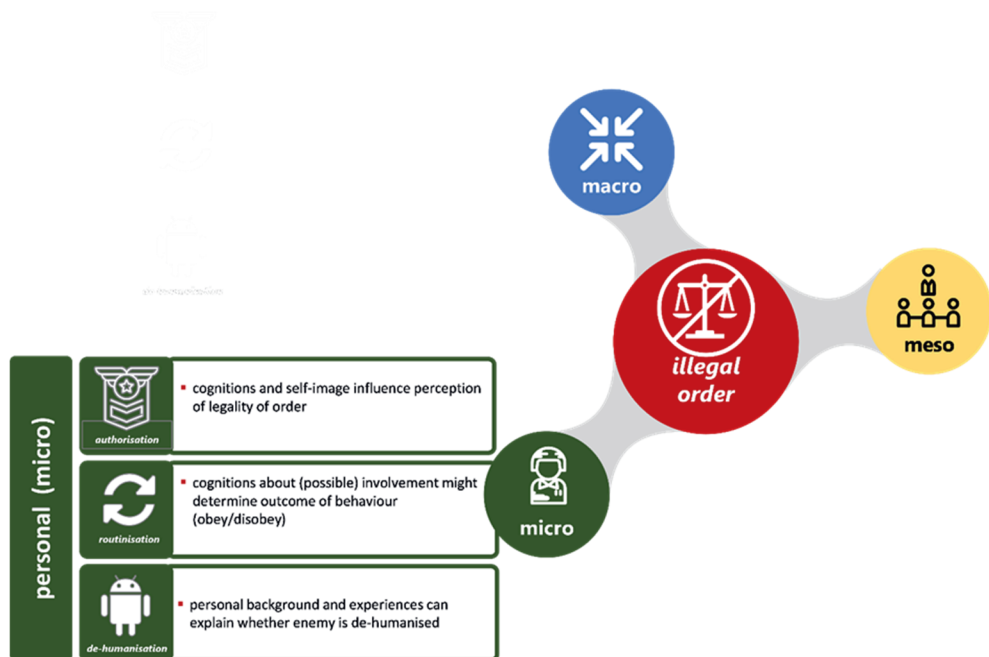


Figure 10 Factors in the micro dimension (individual)

In summary, it is suggested that while obedient soldiers most likely activate moral disengagement mechanisms, summarised as authorisation (of violence), routinisation (of violence) and de-humanisation (of victims) that are commonly reinforced in the macro dimension and perpetuated by surrounding individuals in the meso dimension, disobedient soldiers remain independent and resist succumbing to the powerful environmental and social forces. While the soldier's decision to disobey an illegal order is likely a product of the interaction of factors in these three dimensions, one might not be able to identify a causal relationship. At this point in the development of the theory, it will not yet be possible to determine certain factors that will lead to certain outcomes, as real-life situations are too complex and too idiosyncratic to make predictions. The theoretical framework is proposed as a lens through which conscientious disobedience can be understood and explained.



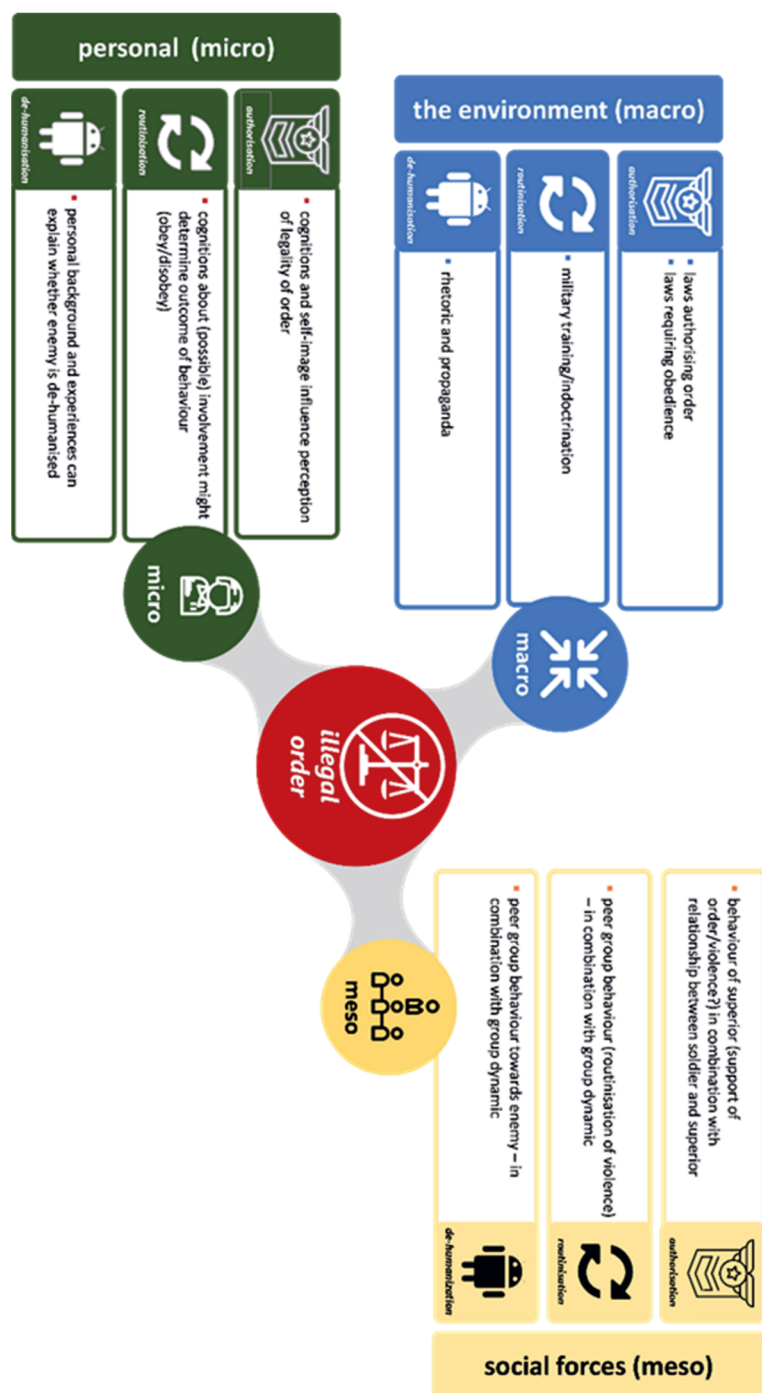


Figure 11 Factors in all dimensions

## Conclusion

First, this chapter explored how soldiers conscientiously disobeyed and placed the responses to illegal orders in a taxonomy of conscientious disobedience. In the context of the present study, conscientious disobedience was defined as any non-execution of an illegal order due to a person's moral convictions. The present chapter argued that disobedience can take two forms: either disobedience is direct, or it is indirect. If soldiers choose to disobey directly, they confront their superior and express their unwillingness to carry out the illegal order. If soldiers choose to disobey indirectly, they do not obey, but find any other action or response without directly refusing to obey. There is hitherto scarce systematic empirical data and theoretical research on conscientious disobedience in situations where illegal orders have been given. Most contemporary discussions revolve around (selective) C.O., which constitutes only one form of conscientious disobedience and ordinarily only refers to *ius ad bellum* cases, rather than cases in which illegal orders are given. The chapter showed that an individual may respond differently to a similar situation at a different time, or, alternatively, try to refuse at first but then choose to evade. The best-known example of a soldier who tried to directly disobey an illegal order was that of Erdemović, whose attempt was ultimately unsuccessful, and he proceeded to obey the order to shoot 70 civilians. In the second stage, he did not deny what he had done, but rather publicly denounced the actions of the Serbian Army.

In the taxonomy, we have seen that soldiers can respond to illegal orders immediately by obeying or by disobeying. It was stressed that a distinction should be drawn between direct or indirect disobedience. In the previous chapters, it was established that numerous moderators can contribute to obedience as soldiers only have to adjust their cognitions, through the use of defence mechanisms such as justification and denial, about the world in order to sooth their conscience. By comparison, directly refusing an illegal order is extremely difficult, as the soldier has to not only overcome his or her training but also deal with the potential legal, social, and institutional consequences. When illegal orders are issued, it is unlikely that a refuser can take recourse to her or his legal right not to obey illegal orders. However, the cases examined in this chapter do indicate that the consequences for disobeying illegal orders are perhaps overestimated.

Indirect disobedience, by contrast, encompasses any other action or exit strategy that allows soldiers to not have to directly disobey (and avoid possible punishment) and not have to commit the crime. Evasion is a more accessible course of action than direct disobedience, as the individual can always hope to get away with it without the legal, social, and institutional consequences of direct disobedience. Possible examples of evasion are limited only by one's imagination. The chapter cited manifold examples of soldiers who found room for manoeuvre when not wanting to obey orders for moral reasons, such as hiding, (feigning) sickness, or running away, with the end result being that they did not carry out the order, but avoided directly disobeying their superior.

In *stage 2*, after some time has lapsed, soldiers can also respond to the illegal orders in a delayed way: soldiers who do not want to receive an illegal order again can either desert from the armed forces or apply for the status of conscientious objector. Desertion is a criminal act and brings immense personal consequences. In most cases, it is not possible to establish whether the desertion occurred as a response to the illegal order per se, or whether it derived from numerous other factors. It is difficult to receive the status of conscientious objector in court, especially if the plaintiff argues that they refused because they were given an illegal order. Rather, an individual may choose to argue that their personal convictions about war have changed, and instead apply for the general status of conscientious objector.

The taxonomy provided in this chapter constitutes a crucial step in coming to a theoretical framework to understand a soldier's behaviour in response to illegal orders. While the individual reasons of conscientious disobeyers are extremely elusive for any study, the environmental factors that may influence and (fail to) motivate soldiers to disobey should be further gathered and compared. In the proposed theoretical framework, the factors that are likely to impact upon individuals, based on social psychological research and the above empirical examinations, include factors in three dimensions: the environment which encompasses external factors such as the conflict and the military institution, the order itself, factors on the meso level which include social forces including the behaviour and influence of the authority and the peer group. Finally, and possibly most importantly, the theoretical framework proposes to study factors in the personal dimension which are likely to contribute to the absence of the processes of authorisation, routinisation, and de-humanisation and thereby impact the soldier's decision-making to disobey. The subsequent two chapters use the theoretical framework brought together in the previous four chapters to explore and explain why individuals conscientiously refused to obey illegal orders in two different cases.

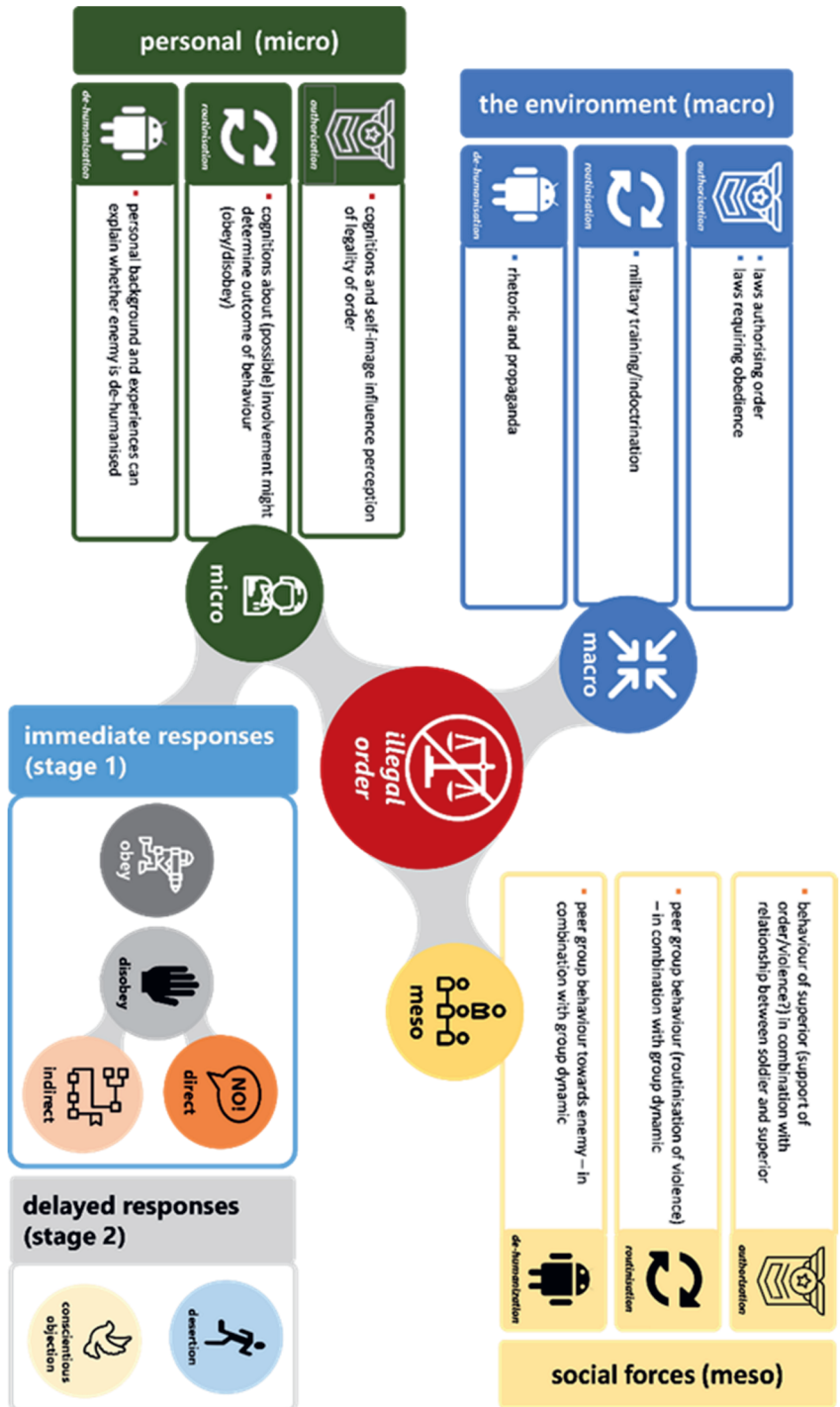


Figure 12 The theoretical framework



# **CHAPTER FIVE**

## **Conscientious Disobedience at My Lai**

*"I just went. My mind just went.... I just killed. Once I started, the whole training, the whole programming part of killing, it just came out." Vernado Simpson<sup>190</sup>*

## Introduction

On March 16<sup>th</sup> 1968, members of Charlie company of the 21st Battalion, of the 11th Infantry Brigade of the Americal<sup>191</sup> Division of the U.S. Army killed roughly 500 unarmed and unresisting civilians in a Vietnamese village known to most as My Lai<sup>192</sup> (Anderson, 1998; Bilton & Sim, 1992; Peers, 1979, p. 17). Early in the morning, the company was lifted into the area of My Lai, ostensibly to engage in their first real battle operation, where they expected to be outnumbered 3-to-1 by combatants of the 48<sup>th</sup> Vietcong battalion. Equipped with extra ammunition, the troops landed in a rice field outside the hamlet. Some troops reported that the American soldiers were shooting so much, that it was impossible to tell (right away) which of the shots might have been enemy fire. On the contrary, other soldiers stated that it was obvious from the beginning that there was no enemy fire at all.<sup>193</sup> Indeed, in the village, the company did not encounter any obvious Vietcong (VC) fighters.

Moving through the fields towards the Vietnamese dwellings, many of the American soldiers shot anyone they saw; a few locals were running away, but the inhabitants, mostly families, were having their breakfast, while the VC fighters had left the village the previous day (Allison, 2012, p. 34). Some soldiers realised that the people who were left in the village were, in fact, civilians, who were unarmed and not resisting (Olsen & Roberts, 1998, p. 79). A number of troops had received orders to first gather the civilians, before subsequently moving the non-resisting family members eastward towards an irrigation ditch where they were then to be mass executed (Bilton & Sim, 1992, p. 120). More than twenty women and girls as young as ten-years-old were (gang) raped, mutilated, and killed (Olsen & Roberts, 1998, p. 99). Even babies were shot and slain with bayonets. Livestock was killed, wells were poisoned and houses were burned. Barely any of the inhabitants of My Lai survived beyond the morning of March 16<sup>th</sup>, 1968.

The infamous My Lai massacre is of particular interest for the study of conscientious disobedience, because the war crimes committed were ostensibly, at least in part, the result of illegal orders, rather than being the work of individual criminal soldiers. Numerous war

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<sup>190</sup> Simpson was one of the members of Charlie company who killed at least 25 people at My Lai. He also stated he cut their throats, scalped them, cut off their hands and cut out their tongues. He said he did not know he had it in him (Bilton & Sim, 1992, p. 7).

<sup>191</sup> The term Americal originates from the contraction of the two units American and New Caledonia (in 1942) (Allison, 2012).

<sup>192</sup> In Vietnamese, the hamlet is called Tu Cung, which is a sub-hamlet of the village of Son(g) My, while for most Americans, the area was also known as either "Pinkville" or My Lai (4).

<sup>193</sup> Perhaps some soldiers truly did not realise that there was no return fire due to their respective position (and also because they were expecting to be shot at), whereas others may have been at a different location from where it was clear that the Americans themselves were the only troops shooting.

crimes were committed over the course of the Vietnam conflict (Angers, 1999, p. 127; Cincinnatus, 1981, pp. 68, 93; Lifton, 1992). However, the atrocities committed at My Lai have received more attention than other comparable events for two reasons: firstly, because Ron Ridenhour, member of the 11<sup>th</sup> Infantry Brigade had heard of the atrocities, and felt compelled to raise awareness and to send over 40 letters to military and political leaders in which he described what he had heard and suggested to “press forward with a widespread and public investigation” leading to a criminal investigation that uncovered the events; (Olsen & Roberts, 1998, p. 151)<sup>194</sup> and secondly, because the allegations could not be denied due to the existence of photographic evidence (Bilton & Sim, 1992, p. 12).<sup>195</sup>

While scholars and journalists have attempted to explain the massacre, there is a relative dearth of work focusing on either those individuals who (conscientiously) disobeyed orders to perpetrate the massacre or those who decided not to take part. This lacuna in extant research could be a consequence of the assumption that non-participation and disobedience may have been deemed to be “normal” behaviour and thus not requiring further examination. However, considering what is known about how easily normal people can take part in massacres, as discussed in Chapters Two and Three, more needs to be learned about those perhaps not so normal (or extraordinary) persons who refused to take part in the massacre.

This chapter revisits the My Lai incident in order to understand soldiers’ duty to disobey illegal orders and learn more about soldiers who consciously refused to take part in the massacre. The chapter applies the theoretical framework by first, in section 5.1, explaining the macro environment and the conflict in which the massacre took place. Then, it reconstructs the orders that were given and analyses soldiers’ respective duty to disobey the illegal order(s). It does so through recourse to the definitions of illegal orders and the duty to disobey that were delineated in Chapter One. Thereafter, explanations for why the crimes were committed are presented in section 5.2, not only because they show how the policy and military environment contributed to obedience and conformity in My Lai, but also as they serve as a relevant baseline from which to explore direct and indirect conscientious disobedience in the same context.

Next, in section 5.3, reported forms of conscientious disobedience in My Lai will be described vis-à-vis the taxonomy proposed in Chapter Four. Subsequently, the chapter revisits factors on the meso level that have previously been utilised to explain the soldiers’ conduct, before proceeding to explicate, in how far factors such as authorisation by leadership, operational context, routinisation of violent behaviour and de-humanisation of the victims could have also impacted on the disobedient soldiers. The chapter ultimately seeks

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<sup>194</sup> General William Peers was tasked to investigate the cover-up of the crimes committed, and the Peers commission concluded that a systematic cover-up of the incident had occurred at every level of command in the Americal Division (Olsen & Roberts, 1998, p. 113).

<sup>195</sup> Interestingly, abuses of Iraqi prisoners at Abu Ghraib were similarly photographed, (internally) reported, and shared with the public by Seymour Hersh (Hersh, 2004).



to answer how and why some of the members of Charlie company refused to take part in the massacre in section 5.4.

In addition to studying various publications on My Lai, an archival study of the transcripts of all the interviews conducted with members of the company was also carried out at the Liddell Hart Military Archives at King's College, London. The data comprised not only numerous interviews with refusers, but also the Criminal Investigation Division files. Based on the available data, the thesis focused specifically on the behaviour of three soldiers whose disobedience was confirmed by others to examine factors on the personal dimension which may have contributed to why the soldiers disobeyed.

### **5.1. The duty to disobey illegal orders at My Lai**

The present section examines the legality of the orders that soldiers of Charlie company received prior to and during the operation in My Lai, for the purposes of understanding soldiers' respective duty to disobey. Information about the orders derives from various reports and interviews, which are brought together here in an attempt to reconstruct what was (most likely) ordered, and at what precise point the line was crossed between a legal military operation and (manifest) violations of the laws of war. Statements about someone's own conduct and the behaviour of others can implicate perpetrators and, to some extent, bystanders. Furthermore, because there was a systematic cover-up of the incident, all statements given by eyewitnesses must be treated with caution, a fact which is discussed in the section Methodological Implications in the Introduction Chapter.

The illegal orders will be reconstructed, placed in context and discussed as how they passed along the chain of command.<sup>196</sup> The focus of the first section pertains to establishing soldiers' duty to disobey, as more information about the origin and context of the order is expedient for understanding the exact circumstances that led to the perpetration of the crimes. The first order discussed is an order by colonel Henderson, which was given during a briefing on March 15<sup>th</sup>, see Figure 13 The Chain of Command at My Lai. Subsequently, lieutenant colonel Barker discussed more details of Operation Muscatine in a further briefing as well as during a reconnaissance flight with some of his officers. The second order discussed came from Charlie company's commander captain Medina as it was forwarded to his soldiers. During the evening prior to the operation, captain Medina briefed his troops about the upcoming operation.<sup>197</sup> The third and final order that will be considered came from lieutenant Calley, leader of the first platoon, on the day of the massacre.

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<sup>196</sup> The most prominent sources are the files from the original Criminal Investigation Division, the Peers Report and both Hersh's and Hammer's account. In addition, Bilton and Sim conducted interviews with members of Charlie company twenty years after the events. With personal statements, one must exercise caution, inasmuch as every person who was quoted as saying that that an illegal order was given, firstly implicated their respective superior and secondly, if that order was manifestly illegal, implicated themselves, as they would have had the duty to disobey.

<sup>197</sup> With the exception of one eyewitness, who also reported having received a direct illegal order from captain Medina on March 16<sup>th</sup>.

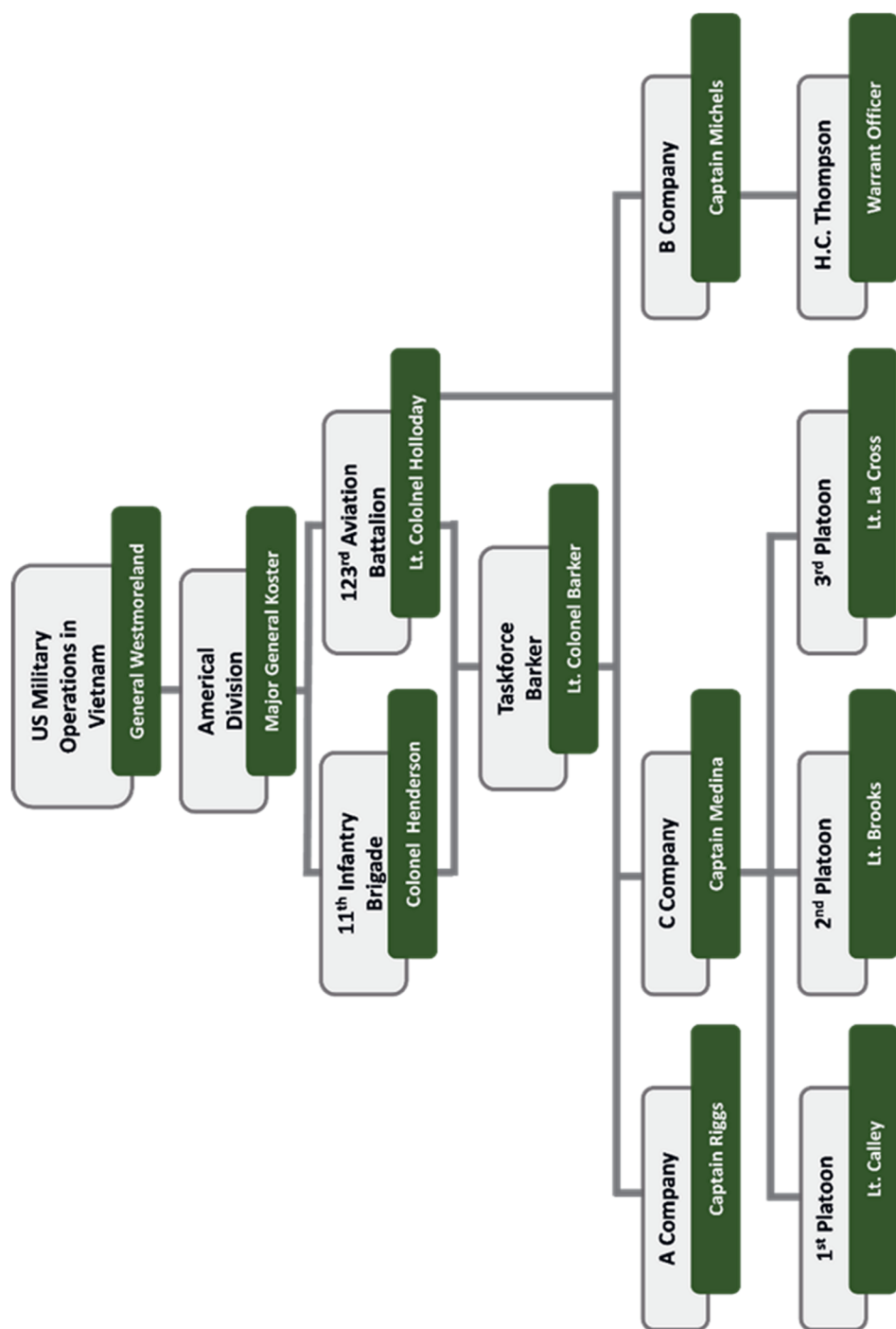


Figure 13 The chain of command at My Lai

### 5.1.1. The context of the order

Colonel Oran Henderson took command of the 11<sup>th</sup> Infantry Brigade on March 15<sup>th</sup>, 1968, one day before the massacre occurred. On that afternoon, he joined a briefing at Landing Zone (LZ) Dottie, 11 km North West of My Lai about Operation Muscatine. Reportedly, Henderson was unimpressed with the brigade's previous efforts to suppress the VC in the area. He supposedly made clear that the VC had to be destroyed as it "gave the Americans so much trouble in the area" (Bilton & Sim, 1992, p. 94). The colonel allegedly gave instructions for a so called "search and destroy mission" to the officers of Task Force Barker, an ad hoc unit that was put together to fight the VC in the Quang Ngai district in the North of South Vietnam. No written accounts exist of the order.

The military's initial recounting of events was as follows: according to the unit's military intelligence officer, captain Kotouc, the village of My Lai was a VC stronghold, where Charlie company was to engage in their first real battle.<sup>198</sup> This roughly 250 to 500 strong VC battalion was considered to be one of the toughest units in the VC and (supposedly) operating out of My Lai (Hammer, 1970). Charlie company planned to attack the hamlet, searching for the fighters and military equipment, destroying weapons and the enemy forces and driving the remnants to the east, where the company would join forces with Bravo Company (Peers, 1979, p. 167). Henderson and his subordinates asserted that the order was a *legal search and destroy mission*. As such, search and destroy missions were not illegal, since the search and destroy referred to weapons and enemy forces.

Immediately after the massacre, Charlie company received praise for their "battle success, killing 128 VC" in a press release in March, 1968 (Olsen & Roberts, 1998, p. 27). Yet, as more information came to light, various accounts about what was actually instructed began to emerge: on the one hand, the task force's intelligence officer captain Kotouc vividly remembered literal orders to burn down villages, kill livestock and destroy crops and foodstuffs, while, on the other hand, the operations officer, major Calhoun, was unable to recall any such instructions (Peers, 1979, p. 167). Captain Medina himself stated in his testimony that he had received specific orders to destroy My Lai, but no instructions as to how to handle civilians (Peers, 1979, p. 167). He remembered Henderson saying: "Forget about stopping and starting to evacuate the wounded, he (Henderson) told the task force officers, he demanded results and aggression" (Peers, 1979, p. 167). Medina also recalled Henderson warning the officers about "men, women, and children in that area picking up weapons and getting away" (Bilton & Sim, 1992, p. 94).

The difference in these testimonies may derive from purposefully "selective memories" of the event: major Calhoun may have been afraid of implicating himself and his superior, while Medina was on trial himself and had to defend his actions and his forwarding of the order. After the massacre occurred, it was emphasised by the higher-ranking (and not directly

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<sup>198</sup> Up until this point, the company had lost members only to booby traps, mines, and sniper fire.

involved) lieutenant colonel Barker that at the time of the operation, no person, except the VC, were to be expected at the location and that the innocent were all supposed to be at the market, while ostensibly the local population had also been warned ahead of the operation (Kelman & Hamilton, 1989, pp. 2-3; Peers, 1979, pp. 166-167).<sup>199</sup> Even if the order was not intended as a manifestly illegal order, all officers would have been obliged to conduct the operation in accordance with the Laws of Armed Conflict. In such a case, Henderson and his subordinate officers should have stressed that non-combatants needed to be protected.<sup>200</sup>

Following the briefing at LZ Dottie, Lieutenant Colonel Barker took captain Medina and the other officers on a reconnaissance helicopter flight, during which further explicit orders may have been given. There is no record of what was said during the flight, and because only Medina was sitting directly next to Barker, only he could hear him, and thus we only have his account of his superior's orders. Barker himself was killed in action in June, 1968. According to Hersh, it is likely that Medina was ordered to burn houses and blow up bunkers and tunnels, along with killing the livestock, which normally would not have been done, but Medina told Hersh that they needed the 48<sup>th</sup> Battalion to move away and therefore the orders were somewhat "unusual" (Hersh, 1970, p. 40). Attacking the villagers was possibly a strategy to both punish the locals for, directly and indirectly, supporting the VC and to disable any future support by destroying the village and the livestock.

One could argue that an order to search and destroy the suspected VC base at My Lai could have been perceived within the realms of a legal order, if it only referred to searching for military targets and destroying them. However, given that it was known that My Lai was not a military base, but rather a civilian village, the principle of distinction, as discussed in Chapter One, was neglected. Even though it is not easy to draw a clear line between civilian, VC supporter, and VC combatant, children must always be protected, as well as combatants *hors de combat*, as discussed in Chapter One.<sup>201</sup> While one could put forward the argument that the destruction of the village was ordered out of military necessity (to drive the VC away and make progress in the area), since civilians were depending on food and housing, the order was arguably not proportionate to the advantages it would have brought about. Henderson neglected his duty to make sure that protected persons would not be targeted. Henderson's order could therefore be considered as illegal, although perhaps not manifestly so. As Kelman and Hamilton argue, independent of the legality of Henderson's order, the ambiguity of the orders and lack of emphasis placed on upholding international law is what creates the kind of permissive environment, in which "sanctioned massacres" occur and in which perpetrators feel their (illegal) conduct is justified or demanded (Kelman & Hamilton, 1989).

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<sup>199</sup> Peers stated that there was no evidence to substantiate these claims (Peers, 1979, p. 167).

<sup>200</sup> Because of the failure to emphasise the need for operating within the Laws of Armed Conflict, the My Lai case is used as an example to illustrate the failure of military leadership (Tripodi, 2011b).

<sup>201</sup> The military principle of distinction is more difficult to apply in non-conventional warfare, where the line between fighters and supporters is blurred, as is the case with children also, who at times act as spies (in this case they would be considered child soldiers). However, infants appear to be protected under all circumstances.

Irrespective of the (il)legality of Henderson's order, the most relevant orders for the present study concern the ones given by Medina to the members of Charlie company. Therefore, the subsequent section investigates whether the order transmitted by captain Medina to his soldiers was (manifestly) illegal, and if the soldiers had a duty to disobey the order.

### **5.1.2. Captain Medina's order**

Charlie company held a funeral service for well-liked sergeant Cox in the afternoon of March 15<sup>th</sup>, directly preceding the briefing for the operation the next day. Captain Medina forwarded his interpretation of the orders he had received from colonel Henderson. Reportedly, Medina gave his troops a pep-talk, of which similar accounts exist with significantly overlapping information. Yet, there are some crucial discrepancies between the accounts when it concerns details regarding the treatment of civilians. As there was no record of the instructions, the present discussion or reconstruction is based on various statements gathered from Medina himself and eyewitnesses.<sup>202</sup> All the accounts are in agreement over the fact that Medina gave orders to search and destroy the My Lai hamlets, where the company expected to encounter their biggest engagement yet. The order was clear: aggressively attack the 48<sup>th</sup> VC battalion, who were expected to be hiding at My Lai. The village was to be destroyed, while it was said that civilians would have left the hamlet to go to the markets. The most important differences between the various accounts of Medina's order concern the instructions vis-à-vis the handling of civilians, which can be classified as two different orders: (1) some eyewitnesses stated that Medina literally said or made clear that everyone at the village was to be attacked and was considered to be an enemy-combatant (including women and children), or (2), other eyewitnesses stated there were no specific instructions regarding how to handle civilians.

Captain Medina himself maintained that he had not specified how civilians were to be treated, claiming they were simply not expected to be present, and if encountered, that they were to be treated as per the Geneva Conventions.<sup>203</sup> However, most statements about the order from members of Charlie company confirm the first version of the order, namely that the order (at least) implied that everybody was to be killed in the village. For example, Max Hutson stated: "he (Medina) had orders to kill everybody that was in the village. We did not expect to find anyone in the village, and when we did, we did as ordered" (Olsen & Roberts, 1998, p. 63). Harry Stanley confirmed this perception: "... he told us to take extra ammunition. He ordered us to kill everything in that village" (Olsen & Roberts, 1998, p. 65). Another member of Charlie Company, Robert T'Souvas, corroborated this version in his testimony, stating that

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<sup>202</sup> As aforementioned in the section on methodology, it is likely that most eyewitnesses did not want to implicate their well-liked superior or themselves. Consequently, their statements need to be viewed with caution.

<sup>203</sup> Medina confirmed during the Army Criminal Investigation in 1969 that he indeed ordered the destruction of houses on the grounds that they had local permission to do so, but that he did not order the destruction of the inhabitants (Olsen & Roberts, 1998, p. 63). However, Medina was not consistent in his testimonies; during Henderson's trial he conceded to having "not been completely candid" with Peers regarding the amount of civilian casualties he witnessed, for example (Peers, 1979, p. 84). His own statement regarding the order unsurprisingly falls under the second category.

he and others understood the order “to kill all the inhabitants (and animals) and shoot anything that moves” (Olsen & Roberts, 1998, p. 68). Similarly, Herbert Carter recalled Medina as saying: “Well, boys – this is your chance to get revenge on these people. When we go into My Lai, it’s open season. When we leave, nothing will be living. Everything is going to go.” (Hersh, 1970, p. 53).

Greg Olsen, who was a member of Calley’s first platoon, testified to the U.S. Army CID: “We had instructions to shoot any military-age male, running from us, or shooting at us. We were then told that we are to clear all the people out of the village ... captain Medina made the statement that we owed the enemy something” (Olsen & Roberts, 1998, p. 64). The troops had the feeling that they should retaliate for their fallen comrades (Hersh, 1970, pp. 38-39). However, when Michael Terry specifically asked Medina to define who the enemy was, Medina gave a vague answer that was open to interpretation, reportedly, answering that the enemy was: “anybody that was running from us, hiding from us. or who appeared to be the enemy” (Hersh, 1970, p. 42). The instructions regarding the handling of inhabitants, especially women and children, left enough room for soldiers to interpret the order as meaning that they could attack all villagers and to take revenge, even though some soldiers specifically testified that Medina “did not order us to kill women and children.... Captain Medina would never have given an order to kill women and children.” (Olsen & Roberts, 1998, p. 64). Michael Bernhardt had a rather nuanced recollection of the order; he reported that Medina “did not actually say to kill every man, women, and child in My Lai. He stopped just short of saying that. He gave every other indication that that’s what he expected.” (Bilton & Sim, 1992, p. 101). In light of these varying accounts, can captain Medina’s “search and destroy order” be considered manifestly illegal? If the order was indeed clearly illegal, then members of Charlie company had a duty to disobey the order.

In Chapter One, the contemporary<sup>204</sup> U.S. military definition of orders was introduced as follows: the will of the commander expressed for the purpose of bringing about a particular action. What was captain Medina’s will regarding the specific actions his men were to carry out at My Lai? If he explicitly ordered his subordinates to kill unarmed civilians, including babies, then his order could be considered manifestly illegal, due to the fact that killing unarmed civilians constitutes murder, as per Article 118 of the UCMJ. The villagers should have been protected under the fourth 1949 Geneva Convention. In that case, the soldiers had a duty to disobey, according to U.S. military and international law.

If Medina, however, did not explicitly order to kill unarmed civilians, he should have, just as his superior should have, stressed the need to protect non-combatants. Civilians should

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<sup>204</sup> The core tenets of U.S. military law (The Uniform Code of Military Justice) have not changed much: Article 90 of the 1956 version of the UCMJ stipulates that: “Any person subject to this chapter who (1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or (2) willfully disobeys a lawful command of his superior commissioned officer; shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct”.

always be spared and protected as laid out by the Geneva Conventions. Failing to give clear instructions and keeping his order vague left room for the misinterpretation that it was indeed the commander's will that "everything, including unarmed civilians, was to be killed". A vague order to kill everything, while not emphasising the need to protect non-combatants, could be classified as negligence and bring about criminal command responsibility.<sup>205</sup> Having said this, this order is not as obviously or manifestly illegal as if Medina had literally instructed the attack on civilians.

Looking at the statements made about Medina's order, it appears, then, that while he did not literally instruct his men to "kill civilians", in fact, his particular desired will and the actions he required indeed included the killing of all combatants and non-combatants. Medina's supposed reply to someone's inquiry about who was to be seen as the enemy, "everything is to be seen as the enemy" strongly supports this interpretation (Bilton & Sim, 1992, p. 99). Yet, since the order was only transmitted orally, Medina could claim in court that he did not order the killing of civilians. During his own defence hearing, he explained that he ordered his men to carry out a regular "search and destroy mission".

As noted above, "search and destroy missions" were routine in Vietnam: they aimed at obliterating enemy camps (not civilian), and destroying stores of weapons, ammunition, other military equipment and food supplies. Peers wrote, "under no circumstances would such search and destroy missions include the wholesale destruction of villages and the killing of non-combatants" (Peers, 1979, p. 29). However, the head of the investigative cover-up team, General Peers, also noted that if that order was transmitted without further explanation, then it would easily lend itself to misinterpretation (Peers, 1979, p. 30).

When placing Medina's order in context, it can be considered to have been illegal, although it can be doubted whether it also can qualify as manifestly illegal. Hersh stated that American military men began quoting Mao Tse Tung to the effect that in guerrilla warfare the guerrillas are the fish and the people are the water. The officers talked about 'catching the fish by removing the water' (Hersh, 1970, p. 5). The Quang Ngai area was declared a "free-fire zone" in which all persons, including civilians, were considered to either be VC or VC sympathisers (Hersh, 1970, p. 23). This was an unofficial, yet illegal, policy that was not in line with the military principle of distinction or the principle of reducing unnecessary suffering. Interestingly, the Army itself realised that the term was inappropriate, as only one month after the massacre in My Lai, a directive went out by Colonel Nels A. Parsen, division chief of staff of the Americal Division, which stated: "Effective immediately, the term 'search and destroy' will not be used in correspondence originating within this command" (Hammer, 1971, p. 22).

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<sup>205</sup> Captain Medina was acquitted of all charges, he argued that he had no knowledge of the misconduct of his men, and when he did find out, he ordered them to cease fire. The jury was instructed to disregard the "should have known of the misconduct of subordinate" and focused on the absence of evidence that Medina knew that his subordinates were committing war crimes (Rockwood, 2007, p. 124).

The Peers Inquiry that investigated the cover-up of the massacre confirmed that, indeed, the local civilians in the area were found to be supportive of the VC (Peers, 1979, p. 167). However, such a finding does not make the civilians a just military target. As discussed in Chapter One, unarmed combatants (i.e. *hors de combat*) are also protected under the Geneva Conventions. Therefore, even if Charlie company had only encountered unarmed VC combatants in My Lai, they would still have had an obligation to take prisoners rather than executing them, as well as having an obligation to evacuate the wounded. Medina's failure to make clear that his company needed to distinguish between protected and unprotected persons while saying "everything and everyone has to be killed" could thus, arguably, be classified as illegal. However, based on the majority of the statements, this version of Medina's order was not perceived to be blatantly wrong or illegal, and, thus, would not necessarily have invoked his soldiers' duty to disobey.

If one assumes that the superior's will was to destroy the people in the hamlet, without making any form of distinction between military and civilian targets, then it should have been identified as being non-commensurable with the principles of the Geneva Conventions. Consequently, the members of Charlie company who realised that Medina wanted to attack unarmed civilians, including children and women, at My Lai, had a clear duty to disobey, irrespective of whether or not these civilians may have been supporting guerrilla fighters.

While the murder (of unarmed civilians) undoubtably constitutes a crime, it may not have been perceived as such by all American soldiers during that time. After all, the lack of protection of prisoners and the way civilians were treated (and often abused) was the rule, rather than the exception, according to Jonathan Shell, reporter at Quang Ngai (Bilton & Sim, 1992, p. 14). The unofficial policy that condoned violence against locals thus made it more difficult for members of Charlie Company to identify their duty to disobey, irrespective of whether Medina in fact ordered the killing of civilians.

### **5.1.3. Lieutenant Calley's order**

The third order discussed here constitutes a direct order instructing subordinates to execute civilians at My Lai by 1<sup>st</sup> lieutenant, William Laws Calley Jr. He and his platoon were the first men to enter the My Lai hamlet after the company was airlifted into the area. At first, many of the inhabitants were rounded up for questioning, while others were shot in a haphazard manner, before the shooting appeared to spiral out of all control (Bilton & Sim, 1992, p. 113). The second platoon entered the village and started killing as well, while the third platoon waited to sweep up and burn ("zippo") the hamlet down (Bilton & Sim, 1992, p. 119). Calley reported a dialogue between himself and Medina, in which he asked what was holding up the first platoon, to which Calley responded "a large group of civilians".



According to Calley, Medina then supposedly instructed him to “get rid of the group” (Bilton & Sim, 1992, p. 119).<sup>206</sup>

Either Calley transmitted that order, if he received it as he claimed, or he was never instructed by Medina to kill the civilians; either way, he proceeded to give the order to his own subordinates. Paul Maedlo and Dennis Conti were seemingly present, as they both stated that Calley ordered them to “take care of them” (Bilton & Sim, 1992, p. 119).<sup>207</sup> The group of civilians in question reportedly included about ten or 15 squatting Vietnamese men with beards, ten women, as well as some elderly people and numerous children (Bilton & Sim, 1992, p. 120). At first sight, Calley’s order may not have been manifestly illegal. Rather, it was ambiguous, as the meaning of “take care of them” is open to interpretation. For example, Calley could have meant for Conti and Maedlo to guard the group. In fact, Maedlo confirmed this interpretation and responded accordingly when Calley asked: “I told you to take care of them”. “We are. We are watching over them”. (ibid.). Then, Calley clarified his order making it clearly illegal. The platoon leader said to Meadlo: “No”... “I want them killed.”... “We’ll get (them) in a line and fire into them” (Bilton & Sim, 1992, p. 120).

Later that morning, when the first platoon went through the village again to round up more villagers, more people were marched to an irrigation ditch outside the hamlet. Calley instructed his men: “We’ve got another job to do”, referring to the 40 to 50 Vietnamese villagers lined up at the irrigation ditch (Bilton & Sim, 1992, p. 121). After some failed interrogation attempts and shooting of some individuals, additional Vietnamese villagers were brought in groups to the ditch, where Calley ostensibly ordered another clearly illegal order to Paul Maedlo and Allan Boyce that he wanted all the Vietnamese dead (Bilton & Sim, 1992, p. 122). Lieutenant Calley also ordered Robert Maples to take part: “Load your machine gun and shoot these people”, in reference to obviously unarmed and unresisting women, babies and elderly (Bilton & Sim, 1992, p. 123).

Calley himself testified in his own court-martial that he ordered Meadlo only in one instance to “waste them”, which was ostensibly the exact order Calley believed he had received from Medina earlier that day (Olsen & Roberts, 1998, p. 112). Whether Calley issued a manifestly illegal order to several of his subordinates is not in question. All soldiers who received this order to execute unarmed locals, along with their children, had a duty to disobey the order. Yet, as the next section outlines, the legal consequences for the perpetration of crimes at My Lai were controversial.

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<sup>206</sup> Captain Medina denied all allegations of having issued such an order. As no other eyewitnesses can support Calley’s claim that he was ordered by Medina to kill the civilians, this supposed order will thus not be discussed in detail here. Also, the wording of the order can be interpreted in numerous ways: Medina could argue that he wanted Calley to make the civilians leave the village. If, indeed, Lieutenant Calley received the very same direct order from captain Medina, namely, to kill the families, then the same duty to disobey also applied to Calley.

<sup>207</sup> There may have been more eyewitnesses, but it was extremely difficult to reconstruct who was at which location at a specific point in time.

#### 5.1.4. Trials resulting from the massacre

The legal consequences for the illegal orders given at My Lai are briefly summarised to support the claim that in the case of My Lai, the U.S. military institution can be considered to having been reluctant to hold its own members accountable for ordering and executing illegal orders, as alluded to in Chapter One. Charges against senior officers in the U.S. military were dismissed, on the grounds of lack of evidence, much to the disappointment of the investigative team led by General Peers, who was concerned about setting precedents (Peers, 1979, p. 223).

Peers' criticisms were supported by other high-ranking military officials, by a Congressman and by journalists, for example the New York Times criticised the dismissal of charges as "serious disservice to the Army"<sup>208</sup> and Congressmen Stratton stated in a speech to the House regarding the dropping of charges against General Koster, "Dropping charges against the highest ranking officer involved, without any public trial or even discussion of the case against him, ... can only result in serious damage to the reputation of the U.S. Army, the United States, and to the effectiveness of the processes and procedures of military justice in dealing with matters which involve profound national and international concerns"(Peers, 1979, p. 224). Peers believed the dropping of charges was a result of the Army fearing to look bad (Peers, 1979, p. 225). Charges against Colonel Henderson only included his involvement in the cover-up of which he was not found guilty (Peers, 1979, p. 226).<sup>209</sup>

Thirteen members of Charlie company were subsequently charged with war crimes, including captain Kotouk, captain Medina, and nine enlisted soldiers as well as 1<sup>st</sup> Lieutenant Calley, who was the only one found guilty (Peers, 1979, p. 227). All other charges were dismissed or the accused were found not guilty. Calley was sentenced to life imprisonment, a sentence that was subsequently reduced to twenty, and then again to ten years, until Calley was released after 3 and a half years on parole due to the massive negative public reaction to the conviction (Kelman & Hamilton, 1989, p. 167).

Since the crimes committed in My Lai received much media attention, many scholars and journalists have sought, and found explanations for why so many members of Charlie company obeyed orders and conformed to the illegal violence. These accounts are summarised below in order to provide a baseline for understanding the factors in the micro and meso dimensions that impacted upon the soldiers, and serve as a starting point for exploring why some soldiers conscientiously refused to take part or conscientiously evaded killing civilians.

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<sup>208</sup> Bob MacCrate continued "What is involved is a failure to recognise the Army's responsibility to the public at large and a failure to affirm the importance of the Army itself of acting in accordance with the rules of international law, the law of war and the principles of our own constitution"(Peers, 1979, p. 224).

<sup>209</sup> In particular, he was charged with: dereliction of duty in failing to conduct a proper investigation, disobedience of a regulation requiring the reporting of alleged war crimes, and making a false official statement and false swearing before the Inquiry.

## 5.2. Factors contributing to obedience and conformity at My Lai

While there were unquestionably some individuals whose horrific conduct appeared to go beyond any superiors' orders, there were arguably also factors in the macro and meso dimension that influenced people who otherwise may have not perpetrated such crimes, as discussed in Chapters Two and Three. The current section provides a summary of the different explanations for why manifold soldiers participated in the massacre at My Lai (Anderson, 1998; Hersh, 1970; Kelman & Hamilton, 1989; Peers, 1979; Smeulers & Grünfeld, 2011; Tripodi, 2011b).

Scholars and journalists have included in their analyses the general context and impact of the Vietnam War, poor leadership, the experience of fighting against guerrillas, as well as in the specific case of My Lai, the loss of well-liked comrades and the respective funerals and subsequent encouragement or (perceived) permission to seek retribution for lost comrades. The groundwork for explaining the My Lai massacre was principally performed by the head investigator of the 1969 cover-up inquiry, General Peers. Peers listed nine, not equally important factors, of which he noted that, "some may have influenced one man to commit atrocities had had no effect another", namely: lack of proper training, attitude towards the Vietnamese, permissive violent attitudes, leadership, psychological factors, organisational problems, the nature of the enemy, and the plans and orders themselves (Peers, 1979, pp. 229-235). As discussed in Chapter Three, Kelman and Hamilton explained that processes such as authorisation, routinisation, and de-humanisation of the victims played a crucial role in the perpetration of My Lai, and officially classified the violence as a sanctioned massacre (Kelman & Hamilton, 1989).<sup>210</sup>

Bandura detailed the cognitive processes that disable otherwise functioning inhibitions when inhumanities are perpetrated, because humans usually do not like to regard themselves as evil or cruel (Bandura, 1999). Therefore, when hurting or killing other human beings, perpetrators create moral justifications, misconstrue the impact of their behaviour and change their attitudes towards the victim: the victim is often placed outside the realm of humanity, blamed for what happened to them, along with the action being regarded as a necessary or even good deed by the perpetrator (Bandura, 1999, p. 200). While these aforesaid factors and processes overlap, it is expedient to evaluate to what extent the theories hold up when viewed in light of those individuals who chose not to take part.<sup>211</sup>

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<sup>210</sup> As there was no immediate threat or provocation by the villagers of My Lai, Kelman classified the violence against the inhabitants of the village as a *sanctioned massacre*. When explaining why the crimes were perpetrated, he looked at factors that had contributed to the occurrence of sanctioned massacres in other scenarios (Kelman, 1973). Kelman defined "sanctioned massacres" as "indiscriminate, ruthless and often systematic mass violence, carried out by military or paramilitary while engaged in officially sanctioned campaigns, and directed at defenceless and unresisting civilians, including old men, women and children" (Kelman, 1973, p. 29). Kelman further noted that the massacre itself does not have to be directly sanctioned; rather, it may form part of a general policy and often occurs during times of war (ibid.).

<sup>211</sup> It should be noted here that these explanations are complementary and interrelated, and should therefore be taken into account together to gain a better understanding of why these individuals behaved in such a gruesome manner,

### 5.2.1. Authorisation

One important weakening of individual inhibitions towards harming others occurs when an individual feels authorised to carry out the harmful or violent act that he is, or perceives to be, expected to carry out (Kelman & Hamilton, 1989, pp. 16-17). The person no longer feels that they bear the responsibility to make personal and moral choices. Rather, he believes that the conduct that would ordinarily not be acceptable is now expected, or at the very least “authorised” (ibid.). This mechanism was also described in Chapter Two and involves ordinary persons carrying out harmful demands from authority figures, simply because they were asked to by an authority. In the military, this authorisation process is institutionalised in soldiers’ duty to obey orders, as unpacked in Chapter One. The authorisation of violence that otherwise would be prohibited is also learned during military training, as discussed in Chapter Three. Most people must learn to overcome their initial resistance to shoot or hurt someone else (Grossman, 2009). During war, violence against enemies is not only authorised but required. In Chapter One, the limits of violence in war (military principles, as well as international legal requirements) were considered at length. There, it was discussed that one clear line that must be drawn is between combatants and non-combatants. In all circumstances, non-combatants must not be targeted and must be protected. Of course, as aforesaid, this line is more difficult to draw in asymmetric or non-conventional warfare, in which a regular military force fights against a non-state actor, who often does not wear a distinct uniform.

Below, two major environmental factors are discussed, both of which have been identified as further contributing to soldiers’ perceived authorisation of violence against civilians or non-combatants: firstly, the company’s (perceived) need to make progress in battle;<sup>212</sup> and secondly, the lack of any official distinction between civilian and combatant being provided. Charlie company<sup>213</sup> was part of the first Battalion, 20<sup>th</sup> Infantry and arrived in Vietnam in December 1967, after the soldiers had been trained in the Schofield Barracks in Hawaii. At that time, the company excelled in training tasks, resulting in the company captain’s nickname “mad dog Medina” (Hersh, 1970, pp. 16-17). Prior to arriving in Vietnam, the

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and why others refrained from participation. Peers’ nine factors can be reclassified vis-à-vis Kelman and Hamilton’s processes, as follows: lack of proper training can be seen as authorisation (some soldiers, who did not recall the laws of war, believed that the orders were legal and felt authorised to carry out their orders, which was compounded by the fact that they were not punished for mistreating the Vietnamese before, allied with the fact that the failure of the leadership to ensure the protection of civilians, in general, in the area and on the specific day also contributed to the perception that the operation was authorised). Furthermore, negative attitudes towards the Vietnamese and the nature of the enemy (guerrillas) compounded the de-humanisation of the locals, as well as their prior experiences (psychological factors) of being hit by snipers and mines, losing comrades, lack of battle success combined with the pep-talk the night prior to the atrocity.

<sup>212</sup> In addition to the general progress that the Americans needed to make in the Quang Ngai area, both superiors, captain Medina and lieutenant Calley, were keen to get a promotion, according to Hersh (Hersh, 1970, p. 19).

<sup>213</sup> Most members of Charlie company volunteered (according to Hersh, 1970, p.18). Half were African American (as well as a few Latinos), most were between nineteen and twenty-one years old and liked comic books just like any other American youth (Ibid). Despite the fact that Charlie company did extremely well in Hawaii, most young men drafted into an infantry unit usually performed poorly on various qualification and aptitude tests (Hersh, 1970, p. 189) Peers concluded that Charlie company was an ordinary or average company, it did not differ from Bravo company for instance (Peers, 1979).

company was highly esteemed and had the self-image of being one of the best companies in the region (Hersh, 1970, p. 17). However, once the unit arrived in Vietnam, their lack of actual battle involvement, meant that the company had scarce opportunity to prove themselves. Before the operation, Americans were demoralised by the heavy defeat of the Ted Offensive, in late January 1968. Subsequent American operations also had little measurable success. In light of these setbacks, commanders Henderson and Barker demanded more aggression from soldiers (Bilton & Sim, 1989).

Charlie company suffered its first casualties in mid-February, when the first privates stepped on booby traps and were wounded by sniper fire (Bilton & Sim, 1992, p. 71). After the company had its worst day with six men killed and 12 injured, a general atmosphere developed of “being tough on the VC” in return for the losses caused by mines and grenades (Hersh, 1970, p. 34). Members of the company had grown frustrated as a result of waiting for meaningful battle engagement that never came, experiencing a lack of success in killing VCs, as well as grieving the loss of comrades (Kelman & Hamilton, 1989, p. 3). Indeed, it is important to note that the funeral of a well-liked comrade directly preceded Medina’s search and destroy order. As discussed above, accounts differ regarding how explicit Medina’s order was regarding the civilian population, but one of the soldiers recalled Medina saying: “This is your chance for revenge”. Therefore, it can be assumed that “many were in the mood for revenge” and felt perfectly authorised to let go of restraints (Kelman & Hamilton, 1989, p. 3).

American political and military leaders had underestimated and misjudged the situation in Vietnam: how long it would take, the lives it would cost, and the lack of effect the massive bombing campaigns would have on North Vietnam (Bilton & Sim, 1992, p. 30). The U.S. strategy had been to overwhelm and wear out the enemy. However, for a variety of reasons, including, for example, the VC’s willingness to accept high casualties, this strategy would turn out to be disastrous. The VC managed to “reproduce” more troops than the Americans expected, and rather than becoming weaker over time, the North Vietnamese only seemed to grow in strength. U.S. soldiers were fighting a war unlike the World Wars or Korean War, in that the troops were fighting an enemy who was not visible. At the same time, the enemy was perceived to be everywhere, especially because the VC laid booby traps and mines and hid in the jungle. Although war generally authorises violence against the enemy or combatants, when combatants or the enemy are not easy to distinguish from civilians, the conflict becomes fertile ground for war crimes. Peers described this factor as the “nature of the enemy”, referring to a new, invisible enemy, which was barely distinguishable from civilians (Peers, 1979, p. 235).

According to Kelman and Hamilton, in the case of My Lai, the policy environment instigated crimes of obedience, in part by keeping the orders vague (Kelman & Hamilton, 1989, p. 2). Further, they argued that authority figures in Vietnam framed violence towards Vietnamese civilians as something which was required or at least permitted (directly or indirectly), which

was especially reflected in the search and destroy mission.<sup>214</sup> While Charlie company went on operations, the soldiers did not encounter the enemy visibly. Instead, they were mostly confronted with civilians, some of which were possibly affiliated to the VC. Some members of the company stated in their testimonies that they were friendly towards the Vietnamese at first, but they became increasingly upset that the Vietnamese did not warn Americans about potential dangers.<sup>215</sup>

While the Americans struggled to make measurable progress in Vietnam, the lack of clear distinction between civilians and combatants also led to an overly inclusive “body count system” of enemies, which was used to encourage American soldiers not to distinguish between civilians and fighters (Anderson, 1998; Bilton & Sim, 1992). Indeed, one popular expression was: “If its dead and Vietnamese, it’s VC” (Bilton & Sim, 1992, p. 38). The absence of punishment for abuses of VC suspects and increasingly also against civilians further contributed to the perceived authorisation of violence towards all Vietnamese (Hersh, 1970, p. 24).<sup>216</sup>

Accordingly, official reports prior to the cover-up investigation specified a body count of 128 VC for the operation in My Lai, while, in fact, there were possibly only a handful of VC killed on their way out of the village (Olsen & Roberts, 1998, p. 29). As discussed above, and confirmed by Anderson, many of the members of Charlie company felt that they had a license to kill (anyone) (Anderson, 1998, p. 6). One consequence of the lack of emphasis on the distinction between civilians and combatants was that it increased soldiers’ readiness to act violently towards the inhabitants of My Lai, as they all came to be viewed as the enemy by many members of Charlie company.<sup>217</sup> The experience of the conflict in Vietnam and rhetoric of the authorities have likely impacted soldiers predominantly in the macro dimension in feeling authorised in their actions against the villagers of My Lai.

### 5.2.2. Routinisation

In response to a question about sexual violence, private Vernardo Simpson responded: “Rape? Oh, that happened every day” (Bilton & Sim, 1992, p. 81). A second process enabling ordinary persons to commit unjust, immoral, and illegal deeds is routinisation. Routinisation of violent behaviour occurs when actions become so organised that there is no more opportunity to raise moral concerns (Kelman & Hamilton, 1989, pp. 17-19). This process has also been designated as normalisation and de-sensitisation (Smeulers, 2011), both of which

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<sup>214</sup> As discussed above, in search and destroy operations not enough emphasis was placed on protecting civilians and maintaining the distinction between military and non-military targets and, as such, the policies and resulting orders did not sufficiently prevent war crimes from occurring.

<sup>215</sup> Please see the references and statements below of Herbert Carter or Ronald Grzesik in section 5.4.4. The Power of Humanisation.

<sup>216</sup> One exception was when a Vietnamese translator insisted on filing a report of a rape, which led to three members of Charlie company eventually losing their rank (Lelyveld, 1969, p. 101).

<sup>217</sup> Some even suspected that the higher-ranking officers may purposefully have planned an operation to brutalise the village and others (Anderson, 1998, p. 6).

are terms that further describe the cognitive mechanisms that many perpetrators utilise in situ. Initially, individuals may have moral restraints that prevent them from being violent; however, the more often the behaviour occurs, the more the general likelihood of internal and overt opposition decreases (*ibid.*). In Chapter Two, this was illustrated in relation to the Milgram experiments: a person who does not question his own wrongful conduct until a certain point (in the experiments, the turning point was the administration of a shock of 150-volts) becomes unlikely to (successfully) confront the authority at all.<sup>218</sup>

For many members of Charlie company, violent conduct and mistreatment of the Vietnamese population and of VC prisoners became increasingly “normal” and a daily experience, and, as such, not something questionable. Hence, the numerous accounts of growing cases of rape, mistreatment of suspects, and ordinary crimes such as theft impacted on what members of Charlie company considered to be normal.<sup>219</sup> Hersh also observed in his interviews that the company began to systematically mistreat its prisoners, and that the distinction between VC and non-VC disappeared (Hersh, 1970, p. 24).

Hammer described daily “activities” in which civilians were raped and shot by members of the company without much ado (Hammer, 1970, pp. 103-106). Some of the soldiers of Charlie company talked about the impunity of increasing amounts and degrees of offences (Bilton & Sim, 1992, p. 79). For example, Fred Widmer said about the abuses: ... “you have those values of what is right and wrong ... I think the frustration got to me, but I also think I started to enjoy it. I guess you could term it the superiority we had over them.”, which is a moral disengagement process that Bandura called “advantageous comparison” (Bandura, 1999). The routinisation of violence toward Vietnamese people seems to have been a prevalent factor in the meso dimension of the theoretical framework, the violence was tolerated and brutality may have become part of the group norm.

Due to the isolation and distance from their civil or “normal” environment, most members of Charlie company felt like they had to stick together. Especially those members of the unit who lost close friends (often referred to as “brothers” in the army) may have been more prone to seek revenge out of suffering from an emotional breakdown as a result of losing a friend. As discussed in Chapter Two, peer groups play a crucial role in determining what becomes normal or acceptable behaviour. At the same time, whether people succumb to group dynamics is a reciprocal process: on the one hand, all members are in the same boat and feel as if they (have to) stick together, especially in battle-space as was the case in Vietnam, while, on the other hand, other sub-groups can be formed, in which sticking together makes the members less prone to the pressure to conform to the broader group influences.

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<sup>218</sup> As discussed, subjects tend to further reduce their moral agency, i.e. the ability to self-regulate behaviour based on moral considerations. When people perpetrate inhumanities, they often rely on cognitive disengagement mechanisms that include justification, advantageous comparison, euphemistic labelling and minimising or misconstruction of the consequences of their actions (Bandura, 1999, p. 194).

<sup>219</sup> Some members were appalled (and expressed their disgust in letters sent home, like Brian Livingston), but these soldiers did not dare to raise concerns with their fellow Americans (Olsen & Roberts, 1998, p. 144).

### 5.2.3. De-humanisation

General Peers noted: “The most disturbing factor we encountered was the low regard in which some of the men held the Vietnamese, especially rural or farming people.” (Peers, 1979, p. 230). A further cognitive disengagement mechanism in the perpetration of violent crimes concerns de-humanisation of the victim (Bandura, 1999, p. 197). Most soldiers in Charlie company had never been abroad and were surprised at the (lack of) development of the Vietnamese population; consequently, they felt like they were thrown back in time hundreds of years, while, for many, looking down on the Vietnamese was not difficult, as the locals had no running water, toilets, transportation, and were mostly illiterate.

De-humanisation during war can manifest itself in many shapes and forms. For example, it helps soldiers to think of the enemy as a (legitimate) military target, but not as a human being, father, son, or friend (see Chapter Three). In most armies, the de-humanisation of the opponent goes further yet, to include dismissive or sub-human references, which enable individuals to overcome their inhibitions (Bandura, 1999, p. 200). Charlie company’s preparation in Hawaii included training about the “social environment” in Vietnam, primarily in the form of instructions about how the Vietnamese were to be treated and respected in line with the Geneva Conventions. Yet, some referred to these instructions as predominantly “cosmetic exercises”.<sup>220</sup> Lifton explained that during basic training, which was often led by Vietnam combat veterans, random killings were introduced in combination with racism, which were to be enacted during search and destroy missions as well as during free-fire zones (Lifton, 1998, p. 21).

De-humanisation also includes the removal of the identity of the victim, who is no longer seen as an independent and distinctive individual (Bandura, 1999, p. 200; Kelman & Hamilton, 1989, p. 19).<sup>221</sup> Euphemistic labelling allows perpetrators to misconstrue the actual deeds of their conduct; for example, Calley first ordered his men to “take care of them” rather than to literally shoot or kill them. Similarly, the victims are also reclassified; for example, American soldiers often referred to the Vietnamese as “gooks” and “dinks”, or “slopes”, with the intent of moving the group outside the human realm for which one would have to feel empathy. During an ongoing massacre, the situational dynamics may further decrease the perception of the humanity of the victims, such as, for example when humans are being slaughtered like animals.

During his interview, Vernardo Simpson, who admitted to having murdered several civilians, stated that “they” (i.e. men, women, children and elderly) were all seen as the enemy. This

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<sup>220</sup> Charlie company received the standard lecture about respecting the traditions and customs of the people, as well as being instructed to try to protect and defend those civilians caught in VC areas. This advice, Hammer (1970, p.93) concluded after interviewing members in 1970, was forgotten as soon as it was given.

<sup>221</sup> Zimbardo argued that de-individuation also helps perpetrators to feel protected (for example, by wearing a uniform), which is somewhat related to entering the agentic state, where the subject may cease to feel personally responsible for their own actions (Zimbardo, 2008).



perception was strengthened by the experience of “the enemy” not having a face, lacking a uniform and being hidden. As discussed in Chapter Two, cognitive dissonance reduction allowed the members of the U.S. Armed Forces to tell themselves that those persons, even though they were not armed, did support the VC and that their children would go onto become VC guerrillas.

Michael Terry, a member of Charlie company, confirmed that a process of de-humanisation was in operation, when stating that the Vietnamese were treated as animals by the company (Hersh, 1970, p. 30). Hammer described how the constant fear of land mines, booby traps, and the possibility of being ambushed led to growing anger and hatred towards all Vietnamese people (Hammer, 1970, p. 102). Frustration, rage, and feelings for revenge can also contribute to cognitive disengagement and elicit blame towards victims (Kelman & Hamilton, 1989, pp. 14-16). Furthermore, Hammer described the level of de-personalisation and de-humanisation within the company, noting that they had become “vultures on the land”, “scavengers in a strange country, leaving in their wake nothing but death and destruction”. Bilton and Sim wrote that: “Finally, at My Lai, they discovered that, [in] having de-humanised the Vietnamese, they had de-humanised themselves” (Bilton & Sim, 1992, p. 21).

The above explained processes of authorisation, routinisation of violence and de-humanisation of the local population, as well as the specific circumstances members of Charlie company found themselves in, have been relied upon when explaining why the violence in My Lai was perpetrated. Despite these factors contributing to the acts of violence, some members refused to actively take part in carrying out the operation. With this in mind, the subsequent section discusses soldiers whose behaviour on that day can be classified as conscientious disobedience towards captain Medina’s and Lieutenant Calley’s respective orders.

### **5.3. Forms of conscientious disobedience**

In Chapter Four, a distinction was drawn between various forms of conscientious disobedience as a pertinent step in better understanding how and why soldiers refuse to obey illegal orders. The behaviour following an illegal order was placed in a taxonomy to illustrate that refusing to carry out illegal orders can take distinct forms: in *stage 1*, conscientious disobedience can either constitute a direct refusal, in which the refuser directly confronts his superior, or it can take the form of evasion or indirect disobedience, in which the conscientious disobeyer does not confront his superior, but nevertheless does not carry out the illegal order in question.<sup>222</sup>

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<sup>222</sup> *Stage 2* refers to delayed forms of conscientious disobedience, which manifest in desertion or the future conscientious objection to carry arms. The present research focuses only on immediate and slightly delayed forms of conscientious disobedience.

Above, it was explained that many environmental and social factors contributed towards many members of Charlie company obeying illegal orders and conforming to the violent behaviour of their comrades.<sup>223</sup> Considering the results from previous studies, it has also been established that some of those who carried out the illegal orders went beyond their instructions to brutally slaughter and mutilate women, elderly, and children.<sup>224</sup> In contrast, the present section depicts an array of reported behaviours that can be classified as falling under the earlier defined forms of conscientious disobedience belonging to *stage 1*. Specifically, the section examines direct and indirect disobedience respectively, to show that different forms of conscientious disobedience occurred during the My Lai massacre.

The actual number of soldiers who took part and who did not, is unknown. As alluded to in previous chapters, many factors impact on the validity of testimonies: on the one hand, admitting to having participated leads to self-incrimination, as well as the fact that testifying to having seen comrades or superiors perpetrate atrocities can be seen as a betrayal, while, on the other hand, claiming not to have participated or even stating having refused to carry out direct orders can also lead to betrayal and self-incrimination (at the time) for the crime of disobedience.<sup>225</sup> Therefore, the accounts of conscientious disobedience are viewed as possible or likely examples of how some soldiers found ways not to take part, rather than representing exhaustive accounts of what actually happened.

First, the conscientious disobedience of a non-member of Charlie company will be briefly described, both because this case is well-known to scholars of the My Lai massacre and because it is relevant for the general study of conscientious disobedience. However, this case lies outside of the proposed framework, because the warrant officer was not a member of Charlie company and he himself did not receive either captain Medina's nor lieutenant Calley's orders. Secondly, forms of conscientious disobedience to Medina's "search and destroy order" are illustrated. Subsequently, forms of conscientious disobedience to Calley's illegal order to shoot civilians will be placed in the theoretical framework.

### **5.3.1. Conscientious disobedience by a non-member of Charlie company**

There is one outstanding individual soldier whose remarkable form of conscientious disobedience is discussed, because his name is often associated with My Lai. Warrant officer, Hugh Clowers Thompson Jr., was a helicopter pilot in the 123<sup>rd</sup> Aviation Battalion (see

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<sup>223</sup> Including, for example, Paul Meadlo, who did not want to carry out the orders, or Vernardo Simpson, who conceded that he shot more and more individuals during that day.

<sup>224</sup> Bilton and Sim described: "Too many of Medina's men were taking morbid pleasure in sadistic behaviour" (Bilton & Sim, 1992, p. 128).

<sup>225</sup> Also, see Chapter on Methodology. Hammer noted that "in the heat and the passion of that morning, it is almost impossible to know who is telling the truth about any of the events or any of the people, or if there is even any real truth" (Hammer, 1970, p. 142). While he is right to point out that finding out the (absolute) truth might be an unrealistic endeavour, it is also important to emphasise that a number of troops in Charlie company also used various methods to avoid participation in the massacre. Whether or not their respective accounts are "true" or whether they embellished their own conduct or deeds, cannot be exactly established.

Figure 13) and was also stationed at LZ Dottie. On the morning of the 16<sup>th</sup>, Thompson was assigned to Bravo company on reconnaissance duty with his two door gunners.<sup>226</sup> He marked spots where he saw injured civilians so they could be evacuated.

However, Thompson noticed that all the civilians he tried to save had been killed by his fellow Americans. When he saw a captain (Medina) execute a girl and noticed more children being shot, he conscientiously took action on their behalf. He did everything by the books. First, he attempted to radio the men on the ground to find out what was happening, but he was unable to reach them (Hersh, 1970, p. 62). Second, he then reported the unnecessary shootings to the brigade headquarters (Hersh, 1970, p. 62).<sup>227</sup> And when all that failed, he landed his helicopter and confronted a higher ranking officer (namely Lieutenant Calley) about a group of civilians (which were about to be killed and hiding in a bunker) (Angers, 1999, pp. 119-120). Calley wanted to throw a hand-grenade into the bunker, while Thompson wanted to evacuate the people (Hersh, 1970, p. 64). By confronting and opposing Calley, Thompson broke the chain of command in order to save civilians during the massacre. Before leaving the helicopter, Thompson ordered his men to fire upon members of Charlie company if they fired upon him or civilians (Angers, 1999, p. 124). By doing so, Thompson again clearly broke the chain of command for conscientious reasons. Thompson and his crew also managed to evacuate one young child they spotted in the ditch among the mass-executed bodies and took the child to the hospital in Quang Ngai (Bilton & Sim, 1992, p. 140). Due to his intervention and efforts to get higher-ranking officers at the headquarters involved, he most likely brought a halt to the killings and allowed for more civilians to be saved by other pilots in aircrafts with greater capacity than his own (Angers, 1999, p. 127). Back at LZ Dottie, Thompson reported (angrily) to his superior what he had witnessed (Bilton & Sim, 1992, p. 140).<sup>228</sup>

Thompson's actions went beyond the call of duty to save civilians: he risked his life and the life of his two machine gunners, confronted a higher-ranking officer, and officially complained about his fellow soldiers to superiors. Yet, his behaviour needs to be placed in context and contrasted with that of members of Charlie company. The most important difference to other soldiers pertains to the fact that he did not personally receive any orders from captain Medina, nor was he directly ordered to shoot civilians by lieutenant Calley. His conscientious disobedience thus falls outside of the framework delineated here, because he did not receive any illegal order as such. Yet, Thompson's conduct is an exemplary case of supererogatory behaviour rather than conscientious disobedience.

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<sup>226</sup> Reconnaissance duty on that day mainly consisted of being an "eye in the sky", to either warn troops of incoming or fleeing fighters, or to attack them, if possible. It was also part of his duty to mark injured civilians for evacuation.

<sup>227</sup> This was apparently heard by Colonel Baker, who then checked in with Medina (who gave him a body count of 310). Then, someone on the ground heard Medina say "that's enough for today", according to Kinch (Hersh, 1970, p. 62).

<sup>228</sup> Thompson was not only heavily pressured by those who took part in the cover-up (Rockwood, 2009, p. 184), it took more than three decades for him to be officially recognised as a war hero (Angers, 1999).

In addition to not having received the illegal order, Thompson's company may have not had the same war experiences as members of Charlie company. For example, as a pilot, Thompson returned to the LZ every day and did not have extended periods of isolation in the field. He also did not suffer (as much) from the psychological experience of fighting an invisible enemy.<sup>229</sup> Nevertheless, Thompson's conduct was already admired by General Peers during his investigation into the cover-up (Peers, 1979, p. 74), although it took almost thirty years for him to be honoured by the U.S. military, when he received the soldier's medal for heroism in 1989.<sup>230</sup> The subsequent sections describe forms of conscientious disobedience by members of Charlie company after receiving illegal orders.

### 5.3.2. Conscientious disobedience to captain Medina's "search and destroy" order

Captain Medina's search and destroy order did not elicit any direct conscientious disobedience the evening before Charlie company attacked the hamlet. No reports nor interviews indicate any soldiers openly questioning the captain's order to "kill everyone" in My Lai, except the aforementioned request (most likely from Michael Terry) to Medina to clarify who the enemy was. While there was no open opposition to the explicit or implicit order, at least one group of soldiers is known to have discussed the order and what it entailed later that evening. Harry Stanley, Herbert Carter and Robert Maples stated precisely this in their respective testimonies to the U.S. Army Criminal Investigation Division. Stanley noted: "The men in my squad talked about this<sup>231</sup> among ourselves that night because the order to 'kill everything in that village' was so unusual" (Olsen & Roberts, 1998, p. 65) while Carter stated: "... when I left Medina's briefing, I knew it was going to be a slaughter of civilians in the village the next day. Stanley and I talked about this before My Lai and we agreed that it would be a slaughter" (Olsen & Roberts, 1998, p. 67). Apparently, neither Stanley, Carter, nor Maples expressed any intention not to participate in the operation planned for the following day. While there is no reported immediate conscientious disobedience towards the order to carry out the mission, there are (somewhat) delayed responses on the day of the operation itself. Because the behaviour of the soldiers immediately followed the actual execution of orders and took place in the spot where the orders were to be carried out, they do fall under the category of immediate responses that make up *stage 1*.<sup>232</sup>

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<sup>229</sup> Although Thompson also lost one of his door gunners (Glen Andreotta), who was his friend and whom he missed dearly (Angers, 1999).

<sup>230</sup> Professor Egal, who initiated the procedure after having seen a documentary about My Lai in 1989 (Angers, 1999). Shortly after My Lai, Thompson was awarded the Distinguished Flying Cross, which erroneously referred to him getting caught in the cross-fire (Angers, 1999, p. 18). Thompson threw that medal out, knowing he received the medal to be shut up.

<sup>231</sup> Referring to the orders given by Medina the night before March 16<sup>th</sup>, 1968.

<sup>232</sup> By contrast, *stage 2* conscientious disobedience takes place at a different time and place from when the illegal order is given, and takes the forms of desertion from the army or the application for the status of conscientious objector.

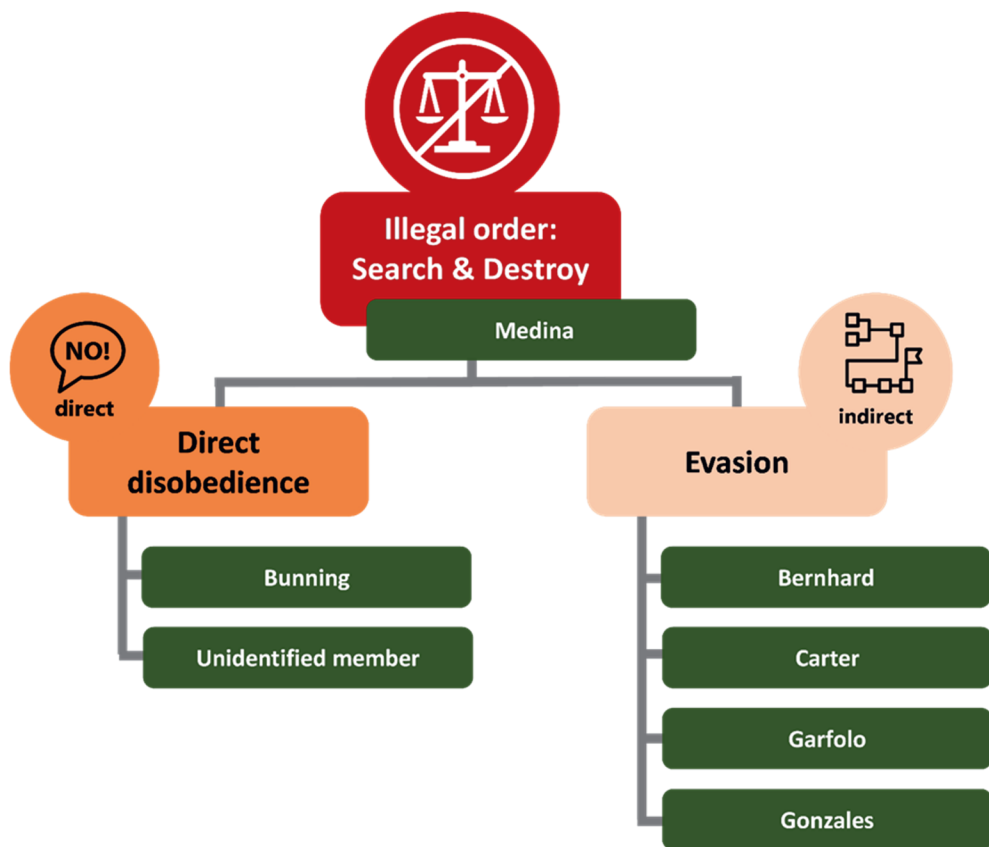


Figure 14 Examples of conscientious disobedience to Medina's order

As one can discern in Figure 14 above, only two soldiers were found to directly refuse to carry out Medina's order. Bilton and Sim found in their research that "a member of the company, Dennis Bunning, informed his squad leader (Ken Hodges) that he was not going to shoot women and children" (Bilton & Sim, 1992, p. 114). It was not discussed whether Hodges indeed had given Bunning a (clearly illegal) order to shoot women and children or, at what point he refused, only that Bunning was then ordered to "get right out in the far left flank, beyond the three line and into the rice paddies" (Bilton & Sim, 1992, p. 114). Since no such order was mentioned, it is assumed here, that Bunning refused to take part in the operation in general.

Hersh also reported the direct conscientious disobedience of another member of Charlie company, namely that one soldier of Charles West's squad had stated that he was simply not able to take part in the killing of a group of children and that the soldier asked and received permission from an officer to let them go (Hersh, 1970, p. 66). Similarly, since there was no explicit mention of an order to kill, it is assumed that the civilians were killed by members of Charlie company as a result of Medina's search and destroy order. Unfortunately, the name

of the soldier was not mentioned. These are the only two cases reported in which troops confronted their superior and refused to actively take part in the operation.

By contrast, more cases are reported of evasive or indirect conscientious disobedience. Michael Bernhardt is probably the best known evader in Charlie company, featuring regularly in all the consulted resources as someone who refused to take part, as well as featuring in documentaries and in news articles as a key protagonist.<sup>233</sup> On the day of the operation, Michael Bernhardt was sent away from his own unit to deactivate and explode a possible mine in a box that was found. Consequently, Bernhardt was physically absent when many of the crimes were committed, including the mass shootings at the irrigation ditch. Accordingly, Bernhardt only received captain Medina's order to go on the search and destroy mission, but not lieutenant Calley's order to execute villagers. He did observe other shootings though, but repeatedly stated that he consciously chose not to take part in the killings.

Three other members of the company are also known to have successfully evaded carrying out Medina's order. One well-known case of evasion is that of Herbert Carter, who said to Harry Stanley: "I can't take this anymore" after they had witnessed a child being shot in front of them. Shortly after, Carter is believed to have purposefully shot himself in the foot to be medevacked away from the massacre (Hersh, 1970, p. 69). One member of the third platoon, Gary Garfalo, did what Hersh described "most GIs did when they could get away with it". "I took off on my own". "He ran south, others joined him"(Hersh, 1970, p. 52).<sup>234</sup> Bilton and Sim noted that Leonard Gonzales, a member of the second platoon, also refused to take part in the killings and went into the fields to evade having to execute the order (Bilton & Sim, 1992, p. 117).<sup>235</sup>

### **5.3.3. Conscientious disobedience to Calley's order to execute civilians**

The second illegal order that was conscientiously disobeyed by members of Charlie company, was lieutenant Calley's manifestly illegal order to execute captured unarmed and non-resisting civilians. According to various sources, at least three members are reported to have directly refused to carry out Calley's order, while another three were found to have evaded executing the manifestly illegal order.

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<sup>233</sup> See for example: Sunday Times, July 30h, 197, "What happened to the soldier who refused to fire at My Lai" or The Sunday Times Magazine of April 23, 1989, "My Lai, the horrifying story of a massacre and the people who can't forget it".

<sup>234</sup> However, Garfalo also seemed to enjoy the shooting of a water buffalo "you don't get to shoot a water buffalo with an M79 every day" (Hersh, 1970, p. 56).

<sup>235</sup> Gonzales also cared for a wounded girl he came across by pouring water over her face and trying to get her to drink, but was unable to help her and walked away with a heavy heart (Angers, 1999, p. 112).

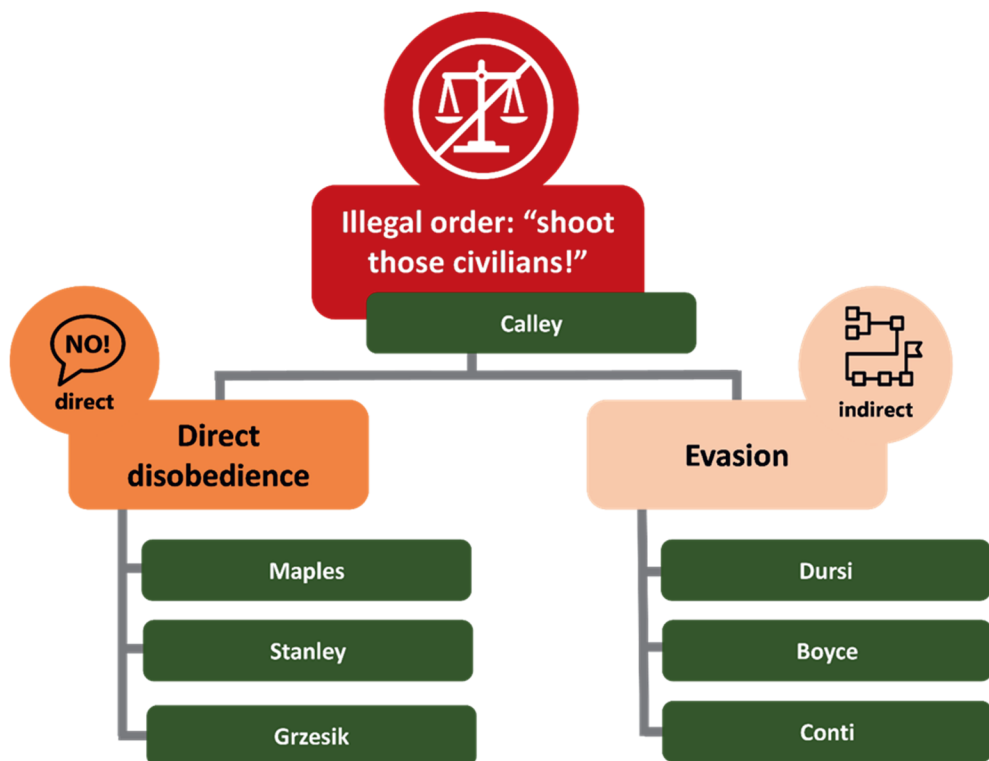


Figure 15 Examples of conscientious disobedience to Calley's order

The first member of Calley's platoon to directly break the chain of command and refuse to execute civilians was Robert Maples. He was also mentioned above as one of the men who talked about Medina's order. Calley reportedly ordered: "Maples, load your machine gun and shoot these people" to which Maples replied: "I am not going to do that" and later confirmed his disobedience to the CID and testified in Calley's trial that he refused to carry out the order (Hammer, 1970, p. 114; Hersh, 1970, p. 63).<sup>236</sup> The second known conscientious refuser was Maple's friend, Harry Stanley. In the interviews with Bilton and Sim, he stated: "I was one of the people he ordered to shoot them, but I refused. He told me that he would have me court-martialled when we got back to base camp. I told him what was on my mind.... Where he could take it ... go to hell!, something like that. Ordering me to shoot down people (hurdled together in a crater), that is not an order, that is craziness to me"(Bilton & Sim, 1992, p. 19).<sup>237</sup>

<sup>236</sup> The aftermath of Maples's refusal is interesting: Calley supposedly turned his M-16 on Maples as if to shoot him there and then. Maples was surprised and relieved when some of the other soldiers interposed to protect him (Bilton & Sim, 1992, p. 123).

<sup>237</sup> A more detailed description of the events can be found in the interview transcripts with Harry Stanley (Bilton & Sim, 1988b, p. 2). One account even described that Calley and Stanley pointed their guns at each other (Angers, 1999, p. 116).

One other individual, albeit a lesser documented case, had also been directly ordered to shoot individuals and conscientiously refused. Ronald D. Grzesik supposedly even refused on a couple of occasions to shoot the people at the ditch, and eventually Calley ordered Grzesik to take his team and help burn the hootches (huts) (Hersh, 1970, p. 66). Although Grzesik was very cautious when testifying at Calley's trial (Hammer, 1971, pp. 148-149), he confirmed that he directly refused Calley's order to "finish them off" (Hammer, 1971, p. 150).

There are also three instructive examples of indirect conscientious disobedience in the form of evasion to Calley's order. Firstly, James Dursi evaded having to shoot children after he inadvertently shot a woman with her baby. During Lieutenant Calley's trial, Dursi testified that Meadlo encouraged him (in tears) to also shoot the people in the irrigation ditch ("Shoot! Why don't you shoot? Why don't you fire?") to which Dursi replied: "I can't! I won't." Dursi expressed his unwillingness to obey to his comrade, not his superior (Hammer, 1971, p. 144).

Then, in court the prosecutor, Aubry Daniel, asked Dursi: "Did lieutenant Calley order you to fire?" "Yes, Sir." Dursi replied. Daniel asked: "Why did you not fire?" to which Dursi answered: "I couldn't go through with it" (Hammer, 1971, p. 144). He said he was not going to kill anyone (else) (Bilton & Sim, 1992, p. 122). He said to Carter while playing with a couple of kids: "He (Calley) can send me to jail but I am not going to kill anybody" (Bilton & Sim, 1992, p. 123). Dursi began to move away from the centre of the hamlet, which can be classified as a form of evasion, as he did not want to be ordered to kill civilians. As he is not known to have directly confronted his superior, his behaviour is classified as evasion, rather than direct conscientious disobedience.

Secondly, Allen Boyce, another friend of Stanley and Maples, "slipped away to the northern side of the hamlet", upon being ordered by Meadlo to kill women and children (Hersh, 1970, p. 50). Prior to his evasion, Boyce had killed a couple of older men in a way that led to his friend saying "That Boyce had gone crazy" (Bilton & Sim, 1992, p. 112).

Thirdly, Dennis Conti decided to stop killing after initially taking part in the shootings (Bilton & Sim, 1992, p. 120).<sup>238</sup> When Calley directly instructed him and Meadlo to kill civilians, "searching for an excuse, [he] pointed out that he was carrying a grenade launcher and he didn't want to waste ammunition on them" (Hammer, 1971, p. 124). He suggested to guard the others from over at the tree line and to shoot individuals attempting to run away. After Paul Meadlo, the most notoriously obedient soldier of Calley's platoon, broke down in tears, Meadlo asked Conti to continue the shooting. Conti testified during Calley's trial that he responded: "If they are going to be killed, I'm not doing it. Let him do it", pointing at Calley (Bilton & Sim, 1992, pp. 120-121; Hammer, 1971, p. 124). When a handful of villagers escaped, Conti fired his grenade launcher into the top of the trees above the running people.

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<sup>238</sup> Conti was also known for raping and sexually abusing girls and women (Bilton & Sim, 1989, p. 29).



Interestingly, the three conscientious evaders initially obeyed orders to carry out the search and destroy mission, but evaded later, possibly after having realised that the victims were civilians. After having described reported forms of conscientious disobedience and evasion, the subsequent section looks at selected cases of conscientious disobedience to better understand this behaviour. On most above-mentioned cases, little to no background information could be located that would have allowed for a detailed investigation into the personal reasons for the conscientious disobedience. Yet, all available information about all conscientious refusers was considered and is included.

## **5.4. Factors contributing to conscientious disobedience**

Despite the brutal war and the horrendous experiences the men of Charlie company had shared together, every soldier still had a moral choice to make at My Lai. Bilton and Sim posit “The men who refused to take part in the massacre were those who recognised the choice they were being asked to make” (1992, p. 19). Through recourse to an interactionist approach delineated in the previous chapters, the next section explores factors in all three dimensions of the theoretical framework that may have contributed to individuals’ conscientious disobedience.

The reasons why these soldiers did not take part in the atrocity are interlinked and complimentary. The above section has considered various explanations for participation and non-participation. In the subsequent section, the crucial individual factors that undoubtedly interact with contextual factors will be examined, to the extent that they are accessible and available. The first part of the section offers a short introduction about three of the conscientious refusers. The three soldiers were selected as their actions were confirmed by other members and Bilton and Sim’s 1989-90 interviews with them were accessible at the King’s College Library. Having background information about the individuals and relying on data collected by interviews with the refusers helps to explain how their experiences and cognitions may have impacted on their disobedience and nonconformity.

Secondly, macro and meso factors that have previously been used to explain why members of Charlie company perpetrated the crimes will also be discussed, in an attempt to question how these influences may have failed to impact upon the individuals who did not take part. The three processes of authorisation, routinisation, and de-humanisation, which are believed to have enabled many of the perpetrators, will be revisited with the intent of finding counter examples to explore why the mechanisms did not work for the disobeyers. Additional anecdotal references to additional conscientious disobeyers are used to underscore some aspects of where these mechanisms failed to work.

Looking at environmental circumstances and how they inhibit and diminish the restraints that “normal” people have when being ordered to be violent towards innocent individuals may help to better understand why individuals in their unique position refused to take part, as well

as allowing for speculation about which personal factors may impact on certain environmental factors. As discussed in Chapter Two, there are moderators that make disobedience to immoral orders more likely (for example, the presence of an authority or, conversely, the presence of opposition to the demands), and there are also mental processes which allow individuals to justify their participation. The third part of this section describes micro factors. In particular, how the three conscientious disobeyers explained their conduct in their own words, in an attempt to complete the picture and obtain a tentative answer to the question of why some individuals conscientiously disobeyed.

#### **5.4.1. Introducing micro factors: Harry Stanley, Robert Maples, and Michael Bernhardt**

Peers pointed out that while his investigation team was unable to detect a pattern of how individuals were specifically affected, he did observe that “some of the soldiers who participated in the operation had steadfastly refused to become involved in atrocities of any form”, without further attempting to explain why some did not want to participate (Peers, 1979, p. 229). Individual predisposition was the most prominent initial explanation for the crimes committed at My Lai, prior to receiving thorough scholarly attention (Anderson, 1998; Kelman & Hamilton, 1989). While criminal disposition, combined with the opportunity to act, may, in part, explain the behaviour of some individuals, as seen above, it is wholly insufficient for explaining the behaviour of all of the perpetrators (Kelman & Hamilton, 1989, p. 14). At the same time, individuals’ background and cognitions may also play a role in those cases in which soldiers refused to take part, and thus will be examined below by looking at the above-described conscientious disobedience of three members of Charlie company: Michael Bernhardt, Harry Stanley, and Robert Maples respectively.<sup>239</sup>

Despite the fact that dispositional factors were considered to play some role in disobedience and nonconformity in the lab experiments, hitherto only a few significant indicators for either behaviour have been determined, as discussed in Chapter Two. Among the scarce results, it was argued that people who scored high in “social responsibility” in personality tests (attributing responsibility to themselves rather than other persons) were often found to be individuals who did not obey authority figures. Unfortunately, no data regarding the individual psychological tests of these men could be found. For that reason, data on conscientious disobeyers is based on their statements in interviews, the interviewers’ comments and environmental factors, as far as they can be reconstructed. As noted in Chapter Two, Milgram himself also relied on background stories or personal experiences when explaining some cases of disobedience in his experiments. Further disobedience (and

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<sup>239</sup> Background information and hints about the conscientious disobeyers are retrieved from extensive interviews conducted by journalists, such as Michel Bilton and Kevin Sim (interviews conducted around 1988), Seymour Hersh (interviews conducted around 1969) and Richard Hammer (interviews conducted around 1969) with three of the above-mentioned conscientious refusers, Robert Maples, Harry Stanley and Michael Bernhardt, respectively.

nonconformity) moderators comprised peer support in obedience studies and not being a group member in Asch's conformity experiments.

Private first class (PFC) Harry Stanley, an African American from Mississippi, volunteered for the military when he was 17 years old. Prior to joining the armed forces, Stanley drove a school bus while attending classes. Difficulties with his father led to him dropping out of school and leaving home (Bilton & Sim, 1988b, p. 1). When he arrived in Vietnam, Stanley was 19-years-old (Bilton & Sim, 1988b, p. 1). Stanley was the soldier previously quoted as saying: "to me, to shoot innocent people, that's not an order, that's craziness to me". He further said: "I did not feel I had to obey that. And if you want to court-martial me, go ahead and do that" (Bilton & Sim, 1988b, p. 2). Stanley apparently realised that certain orders were not "right" and was prepared to face the consequences (a possible court-martial) of his refusal, despite being in the exact same environment as his comrades, and having gone through the same training.

A second individual who broke the chain of command was specialist four (SP4) Robert E. Maples, an African American machine gunner in Charlie company who openly refused Lieutenant Calley's order to "machine gun" the civilians that the first platoon had rounded up near the irrigation ditch. Maples was raised in New Jersey by his grandparents and joined the Army voluntarily out of curiosity (Bilton & Sim, 1988c, p. 1). During the interview with Michael Bilton and Kevin Sim, he described himself as more reserved than most youngsters (Bilton & Sim, 1988c, p. 1). Bilton and Sim described him as a "quiet, mild-mannered, and thoughtful Negro" (Bilton & Sim, 1992, p. 111). Maples was well aware of the absence of return fire, noting that "something was wrong (with the situation, author added) and I did not want to be part of it" (Bilton & Sim, 1992, p. 16).

A third person who did not take part in the killings was sergeant (at the time PCF) Michael Bernhardt of Long Island, New York, who is routinely cited *as the soldier who did not want to take part in the massacre* (Anderson, 1998; Bilton & Sim, 1992; Fey, 1972; Hersh, 1970; Lelyveld, 1969; Wingo, 1970). He was 21 years old when he went to Vietnam. He said he felt sickened and appalled by what he saw in My Lai, but that he felt helpless to do anything about it other than stand and watch (Hammer, 1970, p. 125). "An act like that ...could be done by just about anyone" (ibid.) except those individuals who did not take part in it. Michael Bernhardt did not fire because days before the operation he made a conscious decision not to kill civilians (Fey, 1972), which he observed as occurring with increasing brutality: "first the mistreatment of prisoners, who were the enemy, then prisoners, who weren't the enemy, and then the civilians because there was no more difference. It finally got to the point where a guy could kill anybody he wanted." (Fey, 1972).

When Bernhardt was 14 years old, he expressed the desire to attend La Salle Military Academy (run by Christian Brothers and retired army officers). After four years in the Academy, Bernhardt believed in the values of drill, and the necessity for reflexive obedience and teamwork (Fey, 1972). He volunteered for the army in 1967, and knew what to expect

of training and was curious about going to Vietnam, rather than being apprehensive (Fey, 1972). In a 1972 magazine article, Bernhardt told the reporter that he actually complained about the increasing violence of his comrades and that he tried to convince the others that keeping a prisoner alive, and turning him to work for the South Vietnamese would be much more useful than killing them, as they may learn something that would save their lives (Fey, 1972). At the same time, Bernhardt held Captain Medina in high regard until the My Lai massacre, noting that he was an excellent officer, who was hard but fair.<sup>240</sup>

Michael Bernhardt told Hersh in an interview that a few weeks after the company had arrived at LZ Dottie, lieutenant Calley ordered Bernhardt to shoot a running woman, which he conscientiously refused to carry out, as he was not certain about the legality of the order (Hersh, 1970, p. 25; Lelyveld, 1969). He stated: “I would just fire and miss on purpose after that” (Hersh, 1970, p. 26). He said he thought about asking others about the propriety of the order, but decided he did not want to be a troublemaker (*ibid.*). This story (as it is solely based on Bernhardt’s account) supports the theory that Bernhardt was independent in his decision-making and consistently aware of questionable orders, was repeatedly unwilling to carry out those orders and actively sought to evade them.

While Bernhardt was a notorious outsider or “oddball” (Bilton & Sim, 1989), he also defended his company at points; for example, during his interviews with the criminal investigator, he repeatedly attempted not to single out individuals and emphasised that the unit was like a family and how all they had was each other (Bilton & Sim, 1988a).<sup>241</sup>

#### **5.4.2. Lack of authorisation**

Policy-makers’ frustration about the absence of measurable progress in the war may have led to the lack of any emphasis on distinguishing between enemy combatants and civilians, which, in turn, increased the likelihood for the perceived or actual authorisation of violence against civilians. An important role in the authorisation of violence against civilians was also played by the two authority figures who gave the aforesaid orders. For Milgram, authority plays a crucial role in subjects’ willingness to carry out immoral demands (see Chapter Two).<sup>242</sup>

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<sup>240</sup> Except in the 1970 interview with Stephen Fey, where he reportedly said he thought about shooting Medina to end the massacre, which may have been as a result of the reporter pressing for a better story. In 1989, Bernhardt confirmed in another interview with Bilton and Sim that he did not feel comfortable pointing fingers at the perpetrators, even when asked to. He said he spent a lot of time with these people and he also knew the other side (Bilton & Sim, 1989).

<sup>241</sup> After his mission at My Lai, Bernhardt wanted to remain with the armed forces and became a drill instructor at Fort Dix. He tried to implement his own notion of command responsibility, namely that the officer is always responsible for what his troops do, with or without an order, with or without his presence (Fey, 1972).

<sup>242</sup> To reiterate, the most significant findings about the authority that are of relevance to the present analysis (proximity was not as significant and neither was having two authorities disagree relevant) concerned the physical presence of the authority person (in particular, being next to the subject versus being on the phone) and the validity of the authority (location change from Yale to an ordinary office).

Company commander captain Earnest Medina ordered the general search and destroy mission most likely without further specifying how to deal with civilians. Prior to My Lai, he did not punish abuses of civilians, thereby condoning the violence. Medina seemed to have had a significant impact on most members, with records showing that he was well-liked and respected (Bilton & Sim 1998, 1993).<sup>243</sup> He was concerned about the company being fed well and having sufficient shelter and ammunition (Hammer, 1970, p. 98). Medina grieved losses and wanted to know everything that was going on during the missions, for example who was shooting or shot at, from where, who was hurt, and so on (ibid., p.99). The captain wanted Charlie company to be the best, succeed with the best results and, consequently, as this was how success was ultimately measured, to kill (ibid., p.103). Hence, captain Medina at the very least indirectly contributed to the perpetration of war crimes by allowing the members of Charlie company a chance to seek revenge for their lost comrades, in particular after the service for Sergeant Cox the night before My Lai, as reported by some of the men who were there (Allison, 2012, p. 26). One could thus suggest that because Medina was held in high regards, none of his men questioned the nature of his search and destroy order.

Indeed, Medina appears to have been highly regarded and perceived as a valid authority by every member of the company who was interviewed, with there being almost no indication of negative comments. Of the three conscientious refusers discussed here, Michael Bernhardt evaded having to carry out Medina's order. Along with his comrades, Bernhardt insisted on defending Medina,<sup>244</sup> and claimed that Medina had not literally authorised violence against the villagers. While Bernhardt looked up to Medina, he was not impressed with the way the war was fought in general (Bilton & Sim, 1988a). Bernhardt described the isolation of the company from others as the "other part of the story", and expressed that soldiers only felt accountable to their superiors despite everybody knowing that killing helpless people is wrong, under all circumstances (Bilton & Sim, 1989).

The second order was issued by Medina's subordinate, lieutenant Calley. It was Calley who ordered the manifestly illegal execution of villagers. While he admired captain Medina, Calley did not enjoy a good reputation. In fact, Calley was described as "an undistinguished college drop-out", "instant officer", and "insecure leader" by his subordinates, who recounted his insistence on "being the boss" (Hersh, 1970, p. 20; Kelman & Hamilton, 1989, p. 2).<sup>245</sup> Calley was also described as "Napoleonic, using the war and his rank for his own self-glorification" (Hammer, 1970, p. 100).<sup>246</sup> As aforesaid, despite generally not being well

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<sup>243</sup> Earnest Medina (Mad Dog Medina) was generally accepted as an excellent officer (Hersh, 1970, p. 17).

<sup>244</sup> Bernhardt admired Captain Medina, which could explain why he only implicated Medina on the third occasion that the criminal investigation's division officer questioned him (Hersh, 1970, p. 120).

<sup>245</sup> For example, the men gave him the nickname *surfside 5 1/2*, a reference to a once popular television private eye show entitled "Surfside 6", because Calley told his men he was working as a detective in Miami and was short in stature (Hersh, 1970, p. 20).

<sup>246</sup> Michael Bernhardt talked of his disappointment about the lack of discipline in the company and that officers did not ensure that their orders were carried out (esp. Calley) (Fey, 1972). He was one of the company members who had very little respect for Lieutenant Calley and had little regard for his leadership abilities. Bernhardt and Calley already clashed during training in Hawaii, with Bernhardt telling a reporter about a situation in which he and Calley

respected, some of Calley's subordinates obeyed his orders, including Paul Meadlo. At the same time, it can be argued that because Calley was not regarded as an authority figure by everyone, it potentially allowed more room for manoeuvre and disobedience as response to his manifestly illegal order.

Others, such as Robert Maples, had apparently little difficulty in directly and openly refusing Calley's order. While Maples generally respected and looked up to officers, he chose to act according to his own conscience rather than obeying direct orders (Bilton & Sim, 1988, p. 4). Maples said he did not expect Calley to pull a gun on him after refusing. Instead he said he expected to be court-martialled (Bilton & Sim, 1989-1992, p. 3).

Overall, then, it may have been easier for individual members of the first platoon to conscientiously refuse to carry out an order if they did not respect their superior and did not perceive these orders as emanating from an authority figure. Similarly, subjects in the Milgram experiment were more likely to refuse to carry out the authority's demands when Milgram moved his experiment (Experiment 23) to Bridgeport, Connecticut from the prestigious Yale university campus, with the obedience rate dropping from 65% to 47% (Milgram, 1974).

#### **5.4.3. Absence of routinisation**

As aforementioned, the routinisation of violence towards the Vietnamese enabled many men in Charlie company to act more violently on the day of the massacre. This section will explore explanations for why the group norm of routinisation of violence may have had less impact on the three conscientious disobeyers.

As discussed in Chapter Three, the military has its own culture with different norms and rules, to which members are subjected during training. Aside from being a soldier in the U.S. Army deployed to Vietnam, members of Charlie company also formed sub-groups. Some of those sub-groups were artificial, including platoons and squads, while others were more informal and ad hoc. People are more likely to form groups with like-minded persons; for example, with people who share religious beliefs or with people from the same race (Aronson, 2004).

One such sub-group was formed by Stanley and Maples, which included other soldiers. Stanley also observed how his comrades transformed, noting how a friend (Boyce) had killed an old man and how he was surprised that it seemed to be normal to his friend (Bilton & Sim, 1992, p. 112).<sup>247</sup> Even though Stanley sharply pointed out that while "you were trained to kill, it did not mean that you had to do this, just because you were trained to do it, it does not

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nearly got into a fight (Bernhardt stated that he had the principle that "if an officer ever laid a hand on him, he would brain him" (Fey, 1972). After the near fight, Bernhardt did not expect much in terms of leadership from Calley.

<sup>247</sup> Allen Boyce also evaded having to kill children and babies. Because no further data on this individual was available, he was not included as one of the central conscientious disobeyers.

mean you gotta do it all the time. There wasn't an enemy I could see. There was no-one with weapons firing at us" (Bilton & Sim, 1988b, p. 2). While he himself observed that there was no enemy, he still described his comrades as "just everyday American boys in a wartime situation" but pointed out that they did not have the same moral standards he himself upheld (ibid., p. 4).

When it comes to intervening and stopping others when they (gang-)raped girls, for example, Stanley pointed out that if one would have said anything, it would have shown weakness in the comrades' eyes. Hence, it appears that Stanley was still subject to the company's group norms and approval from the company. Stanley concluded that what happened at My Lai was likely influenced by the desire to get revenge for the loss of comrades, especially when the unit did not find the enemy in My Lai (Bilton & Sim, 1988b, p. 5).

Similarly, Maples stated that: "my fellow Americans were saddened by what happened to our friends" (Bilton & Sim, 1992, p. 18). Interestingly, he excluded himself in the statement and did not refer to "we". This omission perhaps testifies to the fact that he himself did not feel the need to get revenge. While little more is known about Maples, he and Stanley apparently had similar moral standards and ideas about the abuse of the local Vietnamese. Having such peer support strengthens one's ability to stand up to unethical (or in this case, illegal) demands from an authority, as noted in Chapter Two. In Milgram's experiments, disobedience increased from the standard 35% to 90% in Experiment 17, in which the subject was exposed to two peers who refused to administer the shock (Milgram, 1974).

While Bernhardt did not join any group, he observed his comrades' moral inversion that occurred during the routinisation of violence towards the Vietnamese. Bernhardt joined Charlie company later, he came from a different, special, unit (the *Lerps*, long-range recon patrol) and said he was a little disappointed about joining a regular company (Bilton & Sim, 1988d, p. 1). In turn, Bernhardt also noted the company did not like paratroopers, who were perceived as intruders and possibly as "better". Conversely, paratroopers regarded the company as poorly trained. This could have contributed to Bernhardt's self-image and independence possibly based on the feeling that he was somewhat better than the other members of the company, stating about his comrades: "they weren't really that well trained" (Bilton & Sim, 1988d, p. 1), and that he was not going to adjust to the "lower" standards (of morality) of his comrades.

Bernhardt later reflected how already during that time, ostensibly due to their isolation, the rules of the company became those that really counted (Bilton & Sim, 1989, p. 35), which can also be understood as forming their social reality (see chapters Two and Three). Bernhardt described the moral inversion as follows: "the laws back home don't make a difference, comrades who were cruel or brutal were considered somehow courageous, the definition of what was right and wrong was turned around" (Bilton & Sim, 1992, p. 80). He continued to describe his observations as such: "values changed: the 'old' or traditional perception of courage was seen as stupidity, cowardness was accepted, and killing became

the new heroism. Those who did not want to participate in brutalities were seen as weak” (Bilton & Sim, 1992, p. 19). Bernhardt claimed he was appalled by the lack of discipline. He was an outsider, but was respected enough that his comrades limited their abuse of the Vietnamese in front of him, albeit he said he was afraid that they would kill him because he did not take part (Bilton & Sim, 1988a, p. 3).<sup>248</sup>

Because Bernhardt was an outsider or “oddball” as he referred to himself (Bilton & Sim, 1989, p. 35), his desire to conform to the group may have been smaller than that of other group members. Bernhardt believed that a good soldier needed and liked discipline and hardship (Fey, 1972), but that he had little support among his peers for such opinions. He did not know whether they did not agree, did not like him, or whether they feared being ostracised for hanging out with him (Fey, 1972). In Chapter Two, it was discussed that nonconformist behaviour is most likely to be displayed by outsiders of groups, due to the fact that they already do not receive approval from the group, which means that their nonconformity is less threatening to their social position or role.

#### **5.4.4. The power of humanisation**

Referring to Vietnamese population, Hammer described that U.S. soldiers generally believed that “all of them are something not quite human, some kind of lower creature” (Hammer, 1970, p. 71). This de-humanisation was accompanied by a de-personalisation, which involved the use of euphemisms (gooks, dinks, slants, or slopes), as well as psychological processes that made the perception of the Vietnamese population less human, less personal, and less respected. Bandura referred to the “power of humanising” as a counter measure to de-humanisation (Bandura, 1999, p. 202). Accordingly, it is crucial to investigate how far these three individuals who conscientiously refused to kill civilians at My Lai retained a humane representation of the locals.

Stanley was interested in the Vietnamese culture from the beginning of the tour. Stanley learned some Vietnamese before his arrival, and within three months, he was able to communicate with the local population, talking to the children and everyone at base camp. “I used to try to find out a little bit more about them and their lifestyles” (Bilton & Sim, 1988b, p. 5). For this, Stanley was called a “gook lover” by some of his comrades. “I considered the Vietnamese equal to me as I am to them – that’s what my mother taught me” and he said that he noticed that others, especially captain Medina and lieutenant Calley, did not care much for the Vietnamese. “They considered it a slander against the American soldier to actually like the Vietnamese, ... a lot of guys did not like them period. I think what happened at My Lai had a lot to do with that” (Bilton & Sim, 1988b, p. 5).

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<sup>248</sup> Twenty years after the massacre, Bernhardt said he was ashamed to be part of the group, but was still reluctant to point fingers at individual perpetrators (Bilton & Sim, 1989, p. 35).



Maples said of the Vietnamese that they seemed content, however, “we (Americans) did not know what we were doing there” (Bilton & Sim, 1988c, p. 1). Most importantly, Maples said: “I felt bad because they were human beings just like ourselves” (Bilton & Sim, 1988c, p. 3). Maples and Stanley were friends, and due to their similar beliefs and values probably mutually reinforced their humane perception of the local people, in turn, making them less susceptible to the group norm of de-humanisation.<sup>249</sup> Moreover, Bernhardt also attempted to pick up a few phrases and at times tried to remind his comrades that the Vietnamese also had their virtues (namely, industriousness, tolerance, and, above all, patience), which he thought led to him being regarded as a sentimental bore (Lelyveld, 1969, p. 103). He said in the interview with Bilton and Sim that he felt differently about the Vietnamese than his comrades did (Bilton & Sim, 1988d, p. 5).

Several other conscientious disobeyers also regarded the Vietnamese as humans. When Ron Grzesik gave a prisoner something to eat, Medina and Calley got mad (Hersh, 1970, p. 24). Grzesik had 350 hours of Vietnamese language training (Hersh, 1970, p. 32), which could explain why he also failed to de-humanise the Vietnamese. Hirsh described that, in contrast to many others, Grzesik struggled to get accustomed to the daily violence towards the local population, as he grew very fond of one of his Vietnamese instructors at the Army language school in Hawaii (Hersh, 1970, p. 37). He noted that: “You get to like them. I had a little more respect for the average Vietnamese”, but then expressed that his attitude also began to change, which he thought may have been due to frustration with the war, and what the company was exposed to, and that this led him to care less. As he wrote in a letter home: “I would not beat them up, but I also would not try to stop it” (Hersh, 1970, p. 37). Yet, Grzesik also told Calley that he would not question any Vietnamese if they (i.e. his comrades) would not stop beating them up, because he said, there were days where he was just sick of it (Hersh, 1970, p. 37). An additional process of humanisation occurred when the child that the pilot Hugh Thompson and his crew rescued, reminded Thompson of his own child back home (Angers, 1999, p. 130).

Even though Carter did not particularly like the Vietnamese, stating “I used to like the kids – but I can’t stand them anymore ... kinks and slant-eyed people.” (Hersh, 1970, p. 31), he apparently also could not stand seeing them killed, which is probably why he eventually evaded the operation in My Lai.<sup>250</sup> Carter, prior to shooting himself in the foot, supposedly said to Stanley, “I don’t see how anyone could just kill a kid”, to which Carter replied: “I can’t take this anymore” (Hersh, 1970, p. 69). While Carter was violent towards men, seeing children killed appeared to have a different effect on him. Indeed, and perhaps unsurprisingly,

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<sup>249</sup> This fact that both (equally) regarded the local population to be “human” is speculation, as it may have been the case that one of the two friends had a stronger positive image of the Vietnamese which carried over to his friend. In addition, whether they connected because they had similar values/approaches is also speculation. What matters is that having peers with similar views ordinarily strengthens one’s own positions/views (see Chapter Two).

<sup>250</sup> He has been reported as also physically abusing the Vietnamese, such as, for example, when he supposedly broke an elderly man’s jaw and rib with his rifle (Hersh, 1970, p. 31). There are more accounts about Carter’s violent behaviour towards older Vietnamese men, stating in interviews that he thought the men were VC (Hersh, 1970, pp. 32-33).

two of those soldiers who played with the children, Dursi and Carter, had difficulties de-humanising them; on the day of the operation, they were playing with the children, which, in part, explains why they evaded killing any children or their families.

Stanley, Maples and Bernhardt (and some additional conscientious disobeyers) appeared during the interviews to have refrained from de-humanising the Vietnamese in the way that so many of their comrades did, and continued to refer to the villagers as civilians, men, women, children, and babies rather than VC or VC supporters. The power of humanisation may be the most prominent factor in contributing towards conscientious disobedience, because the failure to de-humanise victims makes the authorisation and routinisation of violence less effective. Hence, it appears that the conscience of the refuser does not allow for the cognitive disengagement mechanisms to launch if the underlying belief or perception of the victim as a human persists.

#### **5.4.5. Exploring explanations: In their own words**

There are (at least) two individual factors that impact on individuals' decision to disobey, namely the disobeyers' self-image and cognitions and their personal experiences.<sup>251</sup> This section takes into account the refusers' own explanations for their conscientious disobedience.

Stanley explained himself as follows: "my conscience wouldn't let me do it. If they had been firing at us it would have been different" (Bilton & Sim, 1988b, p. 2). He himself referred to his moral standards as the reason for his non-participation and his refusal. Stanley explained that his mother played an important role (model) in his moral formation. Stanley noted that he and his six brothers and two sisters had to go to church (under pressure from his mother, whether they wanted to or not) and everybody had to believe that everybody was equal (Bilton & Sim, 1988b, p. 3). In black families, Stanley noted, mothers had a strong hold over families (ibid.).

Growing up in the 1960's in Mississippi may have also had a major impact on Stanley, even more so than his influential mother. Perhaps the (learned or transmitted) experience of not feeling equal may explain why Stanley held on to his values, while others succumbed to situational forces. Stanley recounted incidents from his childhood when he wanted to buy an ice cream cone, but he and his brother were turned away, because: "We do not serve niggers here" (Bilton & Sim, 1988b, p. 3). However, experiences with racial discrimination did not affect all African American members of Charlie company, and, indeed, Stanley himself did not link his own experience to his moral perception of other races.

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<sup>251</sup> Social psychologists also do not tend to refer to "personality" as a constant determinant. It should be pointed out that conscientious refusers are not saints. For example, Garfalo shot a water buffalo: "I hit that sucker right in the head." (Hersh, 1970, p. 56) while Carter was violent towards men (and had a violent record prior to his tour of duty according to CID files).

Stanley concluded the interview by saying that “If young soldiers find themselves in that situation, they should try and think of what they’re doing. If there is a God that will stop them from doing it – great. If it’s Mom that will hold them from doing it – great. Or if it is somebody you meet, even a stranger, anybody that stops you from doing what you know is not right.... That’s all I can say. Try to think about it before you do it” (Bilton & Sim, 1988b, p. 6).

“After Vietnam I was not the same person anymore.” reported Stanley, noting that in the very beginning, he still felt like the same person, but that his mother had thought differently. She seemingly did not know what he had done and how to handle him.<sup>252</sup> This underlines that Stanley’s mother was a central figure in his self-image and behaviour. Earlier on, he hung on to the principle he learned in church and from his mother that everyone is equal, but that once his mother failed to “accept” him anymore, he then let go of other moral principles.

In Stanley’s eyes, his comrades were normal, just like him, and that to him, black or white made no difference. “To me, we all came from the same place and I know they all had to have the same values as me somewhere along the line. And if they did not get it in school, they had to get it in religion or church or some place.” (Bilton & Sim, 1988b, pp. 4-5). Stanley himself believed that being a negro (sic) was not different, but that “as far as morality was concerned, it just had to be the way you were brought up because I was not brought up to believe that killing innocent people was the American way”.<sup>253</sup>

Maples stated in his interview with Bilton and Sim that the reason why he refused to shoot someone, whether they were unarmed VC members or civilians, was because it was wrong (Bilton & Sim, 1988c, p. 3). Maples continued: “Disobeying an order is wrong. But if it is something you strongly believe in, then to me it is okay.” The young man was one of the few who observed the brutalisation of his comrades. When he learned that after two VC were killed, someone cut off their ears, Maples thought it was “*gross* and unnecessary” (Bilton & Sim, 1992, p. 111). He stated “I could never do anything like that. It is not in my nature” (Bilton & Sim, 1988c, p. 2). Maples’ own admission of revulsion may form part of the explanation for his non-participation and refusal in the atrocity. It may be the case that already during training Maples was not “brutalised” in the way his comrades were. While the source of his revulsion remains unknown, it may be this “sensitivity” that led to his non-participation and allowed him to retain his moral judgment that what his comrades were doing was wrong (Bilton & Sim, 1988c, p. 3).

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<sup>252</sup> Stanley got into trouble after Vietnam; he sold drugs, committed armed robbery and served 14 months in a penitentiary institution (ibid., p. 4). Hence, his conduct was not always guided by his conscience.

<sup>253</sup> However, Stanley’s own explanation would imply that those 20 or 30 members of Charlie Company were brought up in a different way (namely that killing innocent civilians was acceptable), which for most was not the case, such as Paul Maedlo, who broke down in tears several times during the execution. More likely, the training and the environment changed the morality of those who perpetrated the massacre (in addition to a few who may have enjoyed the slaughter). At the same time, there may be something in Stanley’s upbringing or early life that enabled him to rely on his morality, despite having gone through military training and his experiences in Vietnam.

Bernhardt said in one interview in 1970 that: “It was point-blank murder. Only a few of us refused. I told them the hell with this, I’m not going to do it. I didn’t think it was a lawful order.” (Wingo, 1970) Bernhardt was the son of a salesman in New York, who may have taught him a valuable lesson early in his life: when he was about nine or ten years old, he and his cousin played with a tortoise throwing it into the air and letting it hit the ground. Bernhardt’s father pointed out to the kids that it was very easy to kill something – but not so easy to bring it back to life (Fey, 1972). Bernhardt told this story, when the reporter (Stephen Fey) tried to find out why Bernhardt did not take part in the massacre.

While taking the conscientious disobeyers’ own explanations into account, one must be cognisant of the fact that it is the meaning the individual soldier has ascribed to his behaviour which is important, as discussed in the Introduction. Hence, the explanations should be explored, but not necessarily asserted to be the best or only answer to why people disobey, for the simple reason that people do not always know why they do what they do (Nisbett & DeCamp Wilson, 1977). Only when they are asked after the fact do people come up with reasons and explanations, but whether everyone in fact has complete access to their own moral decision-making is questionable.

When looking at the personal factors that we know about the three soldiers who kept their own moral standards and had the opportunity to act on them, one can say that they describe themselves as either non-violent or disciplined persons (self-image). They all had no normative need to conform to the company. While Bernhardt was an outsider from the beginning, and thus less susceptible to deteriorating group norms, his associations with the military institution and positive military values kept him non-brutalised. Stanley, Maples (and possibly Carter) formed a sub-group that allowed them to resist the group norms of increased violence towards the Vietnamese. Personal experiences and background can be considered to be likely moderators to the occurrence of conscientious disobedience, especially when seen in light of the group dynamics that allowed the individuals in question to maintain a humane image of the Vietnamese.

## **Conclusion**

The My Lai massacre was a dark day in the history of the U.S. Army. Previous research has shown that many of the brutal crimes were committed by average soldiers. Troops frustrated by the nature of the enemy, having received vague orders from their superiors, and increasingly exposed to violence towards the Vietnamese and the toleration thereof, increasingly de-humanised the local population, all served to pave the way for the massacre in the macro and meso dimension. Yet, some soldiers managed to break the chain of command, defy the odds of the environment and conscientiously disobeyed orders, either directly or indirectly, by evading having to take part in the massacre.

The present chapter first offered contextual information about the environment, or the macro factors before it differentiated between (illegal) orders given and examined their respective illegality and the soldier's duty to disobey and then looked at how members of the company conscientiously refused to obey the orders. The general search and destroy order given the evening before the massacre was issued by the well-respected company commander captain Medina. This order was arguably not perceived to be manifestly illegal by a vast majority of the members of Charlie company and, indeed, elicited no immediate conscientious disobedience. Although it was an illegal order that led to the *sanctioned massacre*, the soldiers' duty to disobey was less than obvious to the troops. Despite no obvious immediate conscientious disobedience, some soldiers evaded taking part in the massacre the next day. The number of non-participants, who have not been reported, remains unknown. Two soldiers are known to have openly expressed that they were not taking part in the operation. Given that refusers and evaders likely never received an explicit order to shoot civilians, it may have been easier to nonconform rather than express one's disobedience to a well-respected superior: some conscientious disobeyers disappeared into rice fields or removed themselves from the situation, with one soldier shooting himself in the foot to be evacuated from the scene.

It could be argued that soldier Michael Bernhardt was empowered to conscientiously evade taking part in the operation because he was an outsider, and, hence, was less susceptible to the transformation of the group norms. His self-image included a sense of honour and belief in military discipline that may have allowed him to maintain his conscientious judgment and act upon it in situ. Bernhardt made up his own mind about what was right and wrong; not only did he have a precise perception about what actions were ordered by Medina, he also earlier critically observed the increased brutality and wrongdoing towards the Vietnamese. Not being a member of the group confirms social psychological explanations of nonconformist behaviour, in that Bernhardt was able to keep believing in his own definition of discipline and honour and did not feel inclined to either adjust to the group norms or adopt the inversion of morals he had observed in his comrades.

Second lieutenant Calley's order to shoot civilians on the day of the massacre can be considered as *manifestly illegal*, and therefore a duty to disobey existed. This may explain why more soldiers are known to have conscientiously refused to execute the order, either by directly refusing to shoot or by evading in a different way. In addition to the obvious illegality of the order, Calley was not well-respected as an authority figure, which may have also made direct confrontation easier for the disobeyers in the meso dimension. Two conscientious disobeyers, Stanley and Maples, were friendly with the local population, which diminished their ability to de-humanise the victims. The two also had each other's peer support in their conscientious disobedience. Peer support and lack of authority status were cited by Milgram as explanations for conscientious disobedience in the experiments: disobedience increased significantly when the authority was not perceived as such and when subjects were around others who also refused to obey.

Hence, in response to the question, *why did some soldiers disobey?*, I propose the following answer: the individuals studied relied heavily on their upbringing and personal experiences to explain their ability to see the moral choice they had to make that day. Firstly, all three maintained a humane view of the victims. Secondly, their susceptibility to the violent group norms was diminished by their respective role in the group: one was not part of the group and held discipline and the military institution in high regards, while the other two formed a sub-group where they held on to their own definition of morals. Those social psychological elements, combined with individuals' personal experiences, made the refusers less prone to the influences of war, the orders themselves and the psychological processes that are often responsible for enabling otherwise non-criminal individuals to commit crimes of obedience.

The present chapter applied the proposed theoretical framework to the case of My Lai to explain conscientious disobedience to Medina's "search and destroy order" and Calley's manifestly illegal order to kill civilians. Interestingly, despite the manifest illegality of Calley's order, none of his obedient subordinates were found guilty for obeying the order. By contrast, the subsequent chapter applies the proposed theoretical framework to explain conscientious disobedience in the case of East German border guards. As opposed to the U.S. soldiers, obedient East Germans received sentences for obeying orders that were arguably not manifestly illegal.



## **CHAPTER SIX**

### **Conscientious Disobedience at the East German Border**



## Introduction

Former East German border guard Michael S. told a journalist: “No one told me *you should not have shot*”, and, indeed, he was initially praised by his superiors for preventing an escape attempt (Rosenberg, 1996, p. 263). Just before midnight on February 5<sup>th</sup>, 1989, towards the end of a twelve-hour shift, Michael S. and his comrade Ingo H. caught two young men in the act of attempting to cross the Berlin Wall.<sup>254</sup> Two other guards (Andreas K. and Peter-Michael S.) who noticed the men after the alarm had been raised, yelled out: “Border Guards-Stop!” and shot in the air. Despite the warning, the two twenty-year-old escapees did not respond to the warnings and continued in their attempt to cross the Wall to West Berlin. “Now we must shoot. “Shoot!” the post-leader Michael S. ordered his subordinate. Ingo H. fired his AK-47 assault rifle from about 70 meters away, hitting one man in the foot and the other in the chest, who officially became the last recorded victim to be shot dead at the Wall (Hertle & Nooke, 2009, p. 9). The surviving escapee was arrested and sentenced to three years in prison (Rosenberg, 1996, p. 263). The four border guards who successfully prevented the border crossing were initially praised, decorated, received a bonus of 150 East German Marks and granted several days of vacation (ibid.). When it became known that one of the two men had died, all evidence of the shootings and even the shooters’ membership of their unit was destroyed, with the four guards involved being sent to different troops and instructed not to talk to anyone about the incident (ibid.).

The exact number of attempted or successful border crossings are unknown, as is the exact number of former guards who either shot at border crossers or refused to shoot (Borbe, 2010). Without establishing how many border guards have obeyed or disobeyed orders, the present chapter applies the theoretical framework proposed in the first chapters to shed light on (1) the orders and the duty to disobey in East Germany and (2) on conscientious disobedience to orders that the above-described guards obeyed.

After the fall of the Wall and the German reunification, the four guards became the first former guards to be indicted for shooting escapees (Adams, 1992-1993; Quint, 2000).<sup>255</sup> During these “Politburo- and Mauerschützenprozesse” criminal proceedings, which involved both high ranking members of the Socialist Unity Party of Germany, (i.e. Sozialistische Einheitspartei Deutschlands, hereafter SED) and low ranking members of the military, took place between 1991 and 2004 and led to 270 judgments on the use of lethal force (including the death of victims due to mines). In total, 282 defendants were sentenced to prison, albeit

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<sup>254</sup> Chris Gueffroy and Christian Gaudian were equipped with a rope and a hook, and were supposedly attempting to climb the wall, according to the guards, Gueffroy has been said to form a saddle with his hands for Gaudian to step into (Rosenberg, 1996, p. 262).

<sup>255</sup> Carin Gueffroy, the mother of Chris, who became a joint-plaintiff- already in 1989 pressed charges in West Berlin for the murder of her son (Spiegel, 1990). This allowed the prosecutor’s office to rely on previously gathered evidence.

most sentences were suspended on probation,<sup>256</sup> while 167 of the accused were found not guilty (Buchholz, 2005, pp. 357-358).<sup>257</sup>

Germany was once again faced with accounting for crimes perpetrated by a former regime (Adams, 1992-1993, p. 280). While the legal debate on these trials in Germany has hitherto primarily concerned the rightfulness of the judgments (mainly the principle of non-retroactivity and whether soldiers can be held responsible for obeying orders), this chapter focuses on the position of the former guards in an attempt to better understand how and why some individuals did, while other did not obey orders in this socialist regime.<sup>258</sup>

During the trials, it had to be established to what extent soldiers at the very bottom of the chain of command could be held responsible for carrying out orders in a totalitarian system. According to the widely accepted manifest illegality rule discussed in Chapter One, soldiers only carry a duty to disobey orders if the order in question is (*manifestly*) illegal. Yet, whether the orders East German border guards received can be classified as *manifestly* illegal has been heavily contested (Adams, 1992-1993, p. 285; Arnold et al., 2003, p. 69). In this case as discussed in Chapter One, referring to wrongful orders may be more appropriate, as it includes illegal and lawful-illegal orders. In particular, section 6.1 examines the illegality of the orders, by offering additional background information about the context and factors in the macro dimension, in conjunction with discussing the respective laws and decrees that led to the orders, in order to establish whether these were highly conducive to a political and policy environment in which sanctioned massacres and other crimes of obedience were likely to happen (Kelman & Hamilton, 1989). This section also presents a brief overview of the trials of the shooters, before proceeding to discuss how the firing order and the trials impact upon the duty to disobey and the study of conscientious disobedience in general.

The former guards were embedded in a system established by a non-democratic regime where no recourse to legitimate complaints was possible. The party leadership did not only attempt to indoctrinate the general population, but also established an elaborate spying network in society and the armed forces respectively to ensure that all political opposition was nullified (Richter, 1991, p. 24). Section 6.2 deals with the institutional and social factors in the macro and meso dimension that most likely influenced young men to obey (illegal or wrongful) orders, as proposed by Chapters Two and Three. Consideration of the social and environmental factors allows for a richer understanding of both those who likely did and those who perhaps did not use their moral disengagement mechanisms. This section encompasses manifold factors specific to the training of former guards in East Germany, with

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<sup>256</sup> Only four border guards were sentenced without probation (*ibid.*).

<sup>257</sup> In the 112 criminal proceedings at the district court (Landgericht) Berlin (not including those incidents that occurred outside Berlin) 132 of a total of 246 accused defendants were found guilty for the death of 136 victims (Hertle & Nooke, 2009, p. 24). The group of defendants comprised 10 members of the SED leadership, 42 high ranking military members and 80 border guards (*ibid.*).

<sup>258</sup> See Arnold et al.: *supra* note 9 includes a comprehensive list of sources (Arnold, Karsten, & Kreicker, 2003, p. 69).

the aim of creating a baseline for examining the social influences and mechanisms that explain why indoctrination may not have been successful in some cases.

Against a backdrop of political and military indoctrination, the first step towards better understanding and eventually explaining conscientious disobedience is thus to look at individuals who identified the order as wrongful or illegal. An overview of the guards' (past and reconstructed) perception of the wrongfulness (or illegality) of the order is therefore presented in section 6.3.<sup>259</sup> To achieve this, data was gathered by means of an online questionnaire, which was administered through an online forum about the former border regime in 2011.<sup>260</sup> Eventually 157 former border guards filled out the online questionnaire.<sup>261</sup> Subsequently, the section illustrates how some former guards interpreted the orders given to them, whether they refused to obey these orders and if they refused, how they did so. It situates their behaviour in the taxonomy of conscientious disobedience delineated in Chapter Four.

Further incidents on conscientious disobedience discussed here include exemplary (court) cases of refusers collected from the East German Military Archives in Freiburg, cases from extant literature and cases deriving from the online questionnaire with former guards.<sup>262</sup> Few systematic studies of the border regime exist, in part, because many relevant Stasi documents have not yet been re-constructed and analysed.<sup>263</sup> Previous studies consulted for the study comprise Sälter's *'Grenzpolizisten'*, Gandhagen's *'Von der Grenzpolizei zu den Grenztruppen der DDR'*, Wenzke's *'Staatsfeinde in Uniform?'*, Schultke's *'Keiner kommt durch'* as well as Koops *'Den Gegner Vernichten'* (Grandhagen, 2004; Sälter, 2007; Schultke, 2008; Wenzke, 1995, 1998, 2006).<sup>264</sup>

In addition to describing *how* East German guards conscientiously disobeyed, more needs to be understood about *why* some of the former guards wanted to, or, indeed, refused to carry out their orders. Similar to what has been done in the previous chapter on My Lai, section 6.4 subsequently describes three specific cases of former guards who (say they) did not (want to) obey their orders. The section examines what may have caused their reluctance to carry out the orders. Why did these guards not succumb to the social forces that (may have) influenced those guards who did shoot? In order to answer these questions, the chapter explores possible reasons why they may have not been affected by certain factors and mechanisms (as presented in previous sections) that commonly increase the rate of obedience

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<sup>259</sup> The guards were asked what they thought about their orders in their past.

<sup>260</sup> As of December 2018, the forum called Forum der Grenze (see reference list, internet sources). In addition to posting the invitation to take part in a survey on the forum, all of the roughly 1200 users who could have been former guards received a private message about the survey.

<sup>261</sup> See Appendix 1A.

<sup>262</sup> See the section on Methodology in the Introduction and the Appendix 2 for more detailed information.

<sup>263</sup> Stasi Records at the Federal Commissioner for the Records of the State Security Service of the former German Democratic Republic, link in the bibliography.

<sup>264</sup> In addition to those studies which examined the general regime, news magazine 'The Spiegel' also interviewed individual former guards who shot escapees, thereby adding a number of shooters' perspectives to the public's understanding of the guards (Spiegel, 1991).

and conformity. More specifically, examining the experience of these three former guards offers additional insight into which factors in all three dimensions may have played a role in their respective conscientious disobedience. Furthermore, it contributes towards the establishment of a better general understanding of (some) soldiers in a non-democratic regime, who, despite environmental factors, remained conscientious individuals.

## 6.1. The duty to disobey illegal orders in East Germany

When discussing the duty to disobey illegal orders in the German Democratic Republic (hereafter “GDR”), three pivotal questions arise: what were the orders in question, what was illegal about the orders, and what was the respective guards’ duty? To better understand how and why the order(s) came about, section 6.1.1 offers contextual information about East Germany by describing the events that contributed to the existence of the so called “firing order”. This historical context must be taken into account, because it impacted upon the *social reality* of many of the former guards, especially since the leadership of the SED took measures to deceive society and suppress opposition, with criticism towards the state being criminalised as agitation (“*Hetze*”).<sup>265</sup>

Section 6.1.2 explains the actual legal documents and unpacks why their (manifest) illegality has been contested. There are a number of regulations and decrees that combined form one pillar of illegality, (1) on the one hand, the criminalisation of attempting to leave the GDR and (2) on the other hand, the border guards’ firearms regulations that authorised the use of lethal force to halt such *criminals*. In addition to how the order existed on paper, there is also the issue of the SED’s explicit intention and application of the interpretation of the written law, which may have led to direct “firing” orders at the border.

Finally, the border guards’ respective duty to disobey is discussed in section 6.1.3. To this end, section 6.1.4 provides a brief summary of the Mauerschützen trials to show the reasons for the controversy over the guards’ retroactive prosecutions, ranging from the “manifestly” illegality approach to taking the political context into account when proposing the guards’ (legal) duty to disobey shooting escapees.

### 6.1.1. The context of the border and the Wall

After losing World War II, Germany was divided and occupied by the U.S., the U.K., France, and the Soviet Union. This division would become one of the most visible symbols of the Cold War. The county and city of Berlin were concomitantly divided and occupied by the four winning powers, thereby becoming a Western enclave in the East. Between 1945 and

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<sup>265</sup> In particular Article 106. („Staatsfeindliche Hetze“) of the 1968 Criminal Code, which reads: (1) Wer mit dem Ziel, die sozialistische Staats- oder Gesellschaftsordnung der Deutschen Demokratischen Republik zu schädigen oder gegen sie aufzuwiegeln, and (3) Repräsentanten oder andere Bürger der Deutschen Demokratischen Republik oder die Tätigkeit staatlicher oder gesellschaftlicher Organe und Einrichtungen diskriminiert.

1949, the occupying forces controlled the border in order to stop people from smuggling goods and to intercept war criminals.<sup>266</sup> In 1949, two German states were founded, the Federal Republic of Germany (FRG) in the West and the German Democratic Republic in the East; the Western capitalist aim of creating a free-market society was at odds with the communists' desire to make Germany a dependent socialist state. East Germany became a totalitarian state that grew out of the Russian occupation (Möckel, Pötzsch, & Preiter, 1991, pp. 2-9). While communism was repressed under Hitler, it subsequently replaced the Nazi dictatorship and set up a new repressive political system, in which the state was to regulate the economy. The SED enforced a command economy and established a "big brother network" by having official informants (spies) and unofficial informants (ordinary citizens) report to the Ministry of State Security (Ministerium für Staatssicherheit, hereafter *Stasi*). The main aim was to suppress opposition to their political agenda in its early stages, for which the SED launched a campaign against anybody opposing the regime, including potential border-crossers (von Coburg, 1990, p. 12).<sup>267</sup>

Briefly examining the concept of borders in general, as well as the Inner-, Intra- or German-German border specifically, is expedient for understanding what made the border unique and how it may have impacted on the orders and the guards who received the orders. Borders, in general, divide at least two elements, traditionally territories, from each other (Marx, 2005, p. 15).<sup>268</sup> Borders can also serve as containers or excluders of persons. The German-German border, as its name suggests, divided the territory of one single nation, the territory of the GDR from the territory of that of another state, the FRG. By contrast, international borders primarily serve the function of protecting the territory of a state (or city) from external threats, as well as controlling the migration and passage of both people and goods.

Both German states were internationally recognised sovereign states with their own governing, judicial, and executive bodies functioning within their respective territories. However, in contrast to most other international borders, the two Germanies shared a common language, culture and history; indeed, in many cases, families were divided which is why, from the West German perspective, the states were ultimately to be reunited.<sup>269</sup>

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<sup>266</sup> Even before the official creation of the state and army, the Soviet Union secretly militarised the East German police troops, who were in charge of securing the border. Several people were killed at the frontier before 1949, with the responsibility for those cases lying with the SMAD, the Soviet occupational administration.

<sup>267</sup> Most important was the Stasi. "Any ideas or attitudes that deviated from SED norms were considered to be subversive. In the eyes of the MfS they were a result of the influence of 'enemy headquarters' in the West. In order to track down and eliminate 'hostile negative elements', the MfS sought to penetrate all areas of life of the GDR population." Excerpt from BSTU overview (see link in bibliography). One may rightly point out that all governments aim at impacting and controlling public opinion, and to some extent even the media. However, the degree to which the SED disallowed other political parties and blocked Western television constituted an infringement of people's right to (political) self-determination.

<sup>268</sup> For example, a border can also demarcate metaphorical, symbolic and definitional concepts, such as between good and evil, loyalty and disloyalty, or between persons (Marx, 2005).

<sup>269</sup> The West German Constitution (Basic Law, or *Grund Gesetz*) refers in the Preamble to the transitional character, and stipulates in Article 23 that the law *currently (emphasis added by author)* is valid the following Länder, (and in the other Länder *after (emphasis added by author)* their succession to West Germany). See Article 23: Dieses Grundgesetz gilt zunächst im Gebiete der Länder Baden, Bayern, Bremen, Groß-Berlin, Hamburg, Hessen,

Currently, in the Schengen region in Europe, international borders can be crossed freely, while crossers from outside are firmly kept out (as the nickname Fortress Europe suggests) (Pellerin, 2005, p. 55). By contrast, the Inner-German border intended to keep persons in, which is more comparable to a border or wall around a prison that allowed outsiders to visit, but rarely let insiders leave. This unusual restraining element of the border must be taken into account when examining the border regime and the order, alongside the fact that the border divided a single nation, in a way that is comparable to present day Korea, or Vietnam during the Vietnam war.

In East Germany, the increasing confinement of economic and political rights alienated significant parts of the population and drove between 2,5 and 3,5 million East Germans to emigrate without permission to West Germany between 1949 and 1961 (Nooke, 2009, p. 3; von Coburg, 1990, p. 24). The loss of one seventh of its population had two colossal consequences for East Germany: (1) economically, the state could not afford the massive reduction in the workforce; and (2) politically, the widespread escape of East German citizens undermined the image of the perfect socialist state (Sälter, 2007, p. 17).

In an effort to halt the population fleeing to the West, the SED leadership began building a wall around West Berlin during the night of August 13<sup>th</sup>, 1961. Ten days later, Guenther Liftin was the first person to be shot dead while trying to cross the restricted area near the border (Hertle & Nooke, 2009, p. 37).<sup>270</sup> In an attempt to make the border impermeable, the border guards were tasked to fence in the entire 1281.3 km<sup>271</sup> of the inner German border and to significantly increase the border's security.<sup>272</sup>

The border reinforcement was completed in September 1962 (Sälter, 2009, p. 47). Officially, the newly installed fenced border was labelled as an "anti-fascistic protective barrier" (i.e. protection from capitalism and from NATO attacks), while, in fact, it kept East German citizens inside the Eastern Bloc (Sälter, 2007, p. 13). As will be discussed in section 6.1.2, flight from the GDR was made a criminal offence in 1968. Legal or official attempts to emigrate were also punished: those who wanted to leave and who applied for permission to leave were subsequently subjected to harassment from the Stasi and suffered from a lack of professional opportunities, some had their children taken away, while several thousand people who openly criticised the regime became political prisoners (Borbe, 2010, p. 18; Rosenberg, 1996).

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Niedersachsen, Nordrhein-Westfalen, Rheinland-Pfalz, Schleswig-Holstein, Württemberg-Baden und Württemberg-Hohenzollern. In anderen Teilen Deutschlands ist es nach deren Beitritt in Kraft zu setzen.

<sup>270</sup> The first victim, i.e. a person who died in their attempt to cross the border was Ida Siekman, who jumped out of her bedroom window to West Berlin, where she injured herself to the point that she died en route to the hospital (Hertle & Nooke, 2009, p. 35).

<sup>271</sup> This length is extracted from the Salzgitter report.

<sup>272</sup> In the first instance (planned until November 30<sup>th</sup>, 1961) of the reinforcement, the territorial border included the creation of 265 km of wire, 117 road barriers, 40 observation towers, while in the second instance (until April 1<sup>st</sup> 1962, and November 30<sup>th</sup> 1962) there was wire on 551 km, 199 road barriers and 98 observation towers, respectively (Schultke, 2008, p. 62). The process also included the laying of land mines, clearing of land strips and forests to allow vision within the 100 metre control trip (Schultke, 2008, pp. 62-64).

With every successful crossing, the SED intensified physical measures to halt the population flow, including the installation of spring guns, mines, and the use of dogs. On average, control towers were built every 500 metres and manned with two guards or “posts”. The restricted area was also equipped with movement alarm systems, which allowed for surveillance day and night.<sup>273</sup> Despite these constraints, East Germans continued to cross the border between 1961 and 1989,<sup>274</sup> including thousands of NVA (Nationale Volksarmee, or National People’s Army) soldiers who deserted to West Germany (Wenzke, 1998).

Among the tens of thousands of people who successfully crossed the border from East to West Germany after 1961, estimations of total fatalities at the border range from 270 to more than four thousand persons (Borbe, 2010, p. 34). Some died in accidents jumping out of houses, others died from drowning in the water, while some were killed by stepping on landmines and others were shot dead (Borbe, 2010; Sauer & Plumeyer, 1991). Although exact numbers of the victims of shootings do not exist, estimations range from 164 to 1303 people (Borbe, 2010, p. 34).<sup>275</sup>

Based on the 1951 Refugee Convention, German courts and journalists began to refer to border crossers as “refugees”, as the Convention defines persons who will be persecuted in their home state as refugees, including persecution for political reasons, which unquestionably anyone who was caught attempting to leave the GDR was.<sup>276</sup> As of 1968, the attempt to leave the GDR was officially criminalised as a crime known as a “Flight from the Republic”, (“Republikflucht”), which contained the word *Flucht*, from which the German word for refugee is derived (“*Flüchtling*”). The orders that led to the killing of *refugees*, or “East Germans attempting to cross the border” comprises two interdependent elements: the criminalisation of leaving (including attempting to leave) the GDR on the one hand, and firearms regulations on the other. Both elements will be discussed in the subsequent section.

### 6.1.2. The laws that created the firing orders

Because former East German border guards shot people dead, the orders they received have been referred to as “firing orders”, albeit this term has been rejected by many members of the

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<sup>273</sup> See: Sauer & Plumeyer for images and drawings (Sauer & Plumeyer, 1991).

<sup>274</sup> People found creative ways to escape, including homemade hot air balloons, digging tunnels, swimming across water, all of which can be found on Chronik der Mauer, see reference list, internet sources.

<sup>275</sup> Interestingly, the SED leadership emphasised in their propaganda that border guards were the actual victims; it has been estimated that 25 guards were killed during service in a 40-year period, but according to former border guard officials, at least half of them were killed by defectors from the police force, the NVA and border guards themselves, with only a handful being killed by civilians escaping to the West (Borbe, 2010, p. 34; Liebig, 2005, p. 296).

<sup>276</sup> Please refer to Articles 1 (2) of the Convention and Protocol relation to the Status of Refugees, As a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

former regime (Baumgarten & Freitag, 2005, p. 15).<sup>277</sup> The present section explores what these orders entailed: (1) the legal grounds on which “shooting orders” were given; as well as (2) the actual application and interpretation of their legal basis. As aforementioned, policies can be formulated in a vague manner on purpose, in that it allows policy makers to refuse to accept responsibility for sanctioning illegal acts (Kelman & Hamilton, 1989). Furthermore, one can make a useful distinction between two types of orders, both of which people may refer to when talking about “the firing order”: firstly, there are written standing orders, and secondly, there are guards who actually witnessed an escape attempt and may also have received a more direct or explicit (firing) order to shoot (at) particular persons attempting to cross the border.

While the latter may be more appropriately labelled “firing order”, the former is crucial as it establishes the legal basis that allowed for an interpretation of the “firing order” without literally instructing the use of lethal force (which allows for the denial of the existence of such an order). In order to explain how this term came about, first, the criminalisation of attempting to cross the border is examined, before proceeding to examine the actual firearms regulations.

Multiple reassignments of the border guards brought about frequent changes in the regulations, with the most drastic of these changes occurring in 1961, when the border guards were officially converted from being a police unit under the Ministry of Interior, the “Grenzpolizei”, to a military unit under the Ministry of Defence, namely into the border troops or “Grenztruppen”.<sup>278</sup> Irrespective of who the guards were accountable to, they had to obey orders. As discussed in Chapter One, the definition of orders include standing orders, regulations and decrees (or “Befehl” and “Dienstvorschriften”) (Sälter, 2009, p. 184). In addition to looking at official regulations, exploring further documents and statements from SED officials may also reveal the (not so) hidden intentions of the regime.<sup>279</sup>

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<sup>277</sup> Baumgarten and Freitag stated: “Mit der angeblich rigiden Durchsetzung eines von niemand gesehenen „Schussbefehls“ wird ideologischer Missbrauch getrieben” (Baumgarten & Freitag, 2005, p. 15).

<sup>278</sup> The above described Cold War context accounts for numerous changes the border regime underwent in the early years: the SED secretly transformed the border police into the border troops as part of the army (NVA) because the reestablishment of the military in Germany was prohibited before 1955 (with Soviet support), and because the security structure of the East German state mirrored the changing Soviet structure (Sälter, 2009, pp. 61-62). For example, in 1952, the border guards were reassigned from the Ministry of Internal Affairs to the Secretary of Internal Affairs, then to the Ministry of Defense and back to the Ministry of Internal Affairs in 1953. Yet, already in the 1950s, police ranks and uniforms were replaced with military uniforms and ranks (Sälter, 2009, p. 71) and with the growing need to meet the SED’s demands to secure the border, the serving men in the border guards increased from initially 600 in 1945 to about 40000 in 1958 (Sälter, 2009, p. 80). In 1955, another reassignment made the border guards accountable to the Stasi where it remained until 1961, when the border guards were officially reorganised into the armed forces and made accountable to the Ministry of Defense, while the Stasi remained present with an elaborate official and unofficial spy network (Schultke, 2008, p. 115).

<sup>279</sup> On November 6<sup>th</sup>, 1989, Erich Mielke, the Secretary for State Security, ordered the destruction of official directives in the county administration offices as well as the transfer of sensitive operational files to the higher-level district administration offices (Engelmann, 2015, p. 176). Some files were burnt, while others were shredded or torn. See BSTU in bibliography. and shredded documents cannot be reconstructed. Because East German citizens were aware of the destruction of potential evidence for crimes committed by the Stasi, Stasi buildings were occupied by ordinary people until formal action was taken by the prosecutor’s office (Engelmann, 2015, p. 177). Of the 16,000



At the time of the border crossings, in most Western-European countries, leaving one's state was generally not regarded as a criminal offence, while in some cases trespassing was merely regarded as a misdemeanour.<sup>280</sup> Formally, in the early years of the GDR, the official laws were directed at *trespassers* until (the intention of) leaving the GDR officially became a crime in 1968. The criminalisation of trespassing of the "secured" area formed the legal basis for the use of lethal force. The first law restricting the "unauthorised approach and crossing" of the border came into effect in 1952.<sup>281</sup> The Police Order already included a passage that referred to the "illegal departure from the GDR", while officially emphasising the protection from external threats (spies) as their major intent in the opening statement.<sup>282</sup> The attempt to emigrate was not yet per se an (official) offence.

Then, in 1954, the Passport Law (*Pass Gesetz*) required every citizen to apply for a visa prior to crossing the border; if the request for a visa was denied or never occurred in the first place, then the crossing of the border (or the area near the border) was considered to be an "*unauthorised attempt to leave the GDR*". Article 8 was the forerunner of the final criminalisation of the attempt to leave the state.<sup>283</sup> Three years later, the additional protocol to the Criminal Code ("*Gesetz zur Ergänzung des Strafgesetzbuches*" or "*Strafrechtsergänzungsgesetz*" of December 11<sup>th</sup> 1957), the instigation or facilitation to leave the GDR was criminalised under Article 21.<sup>284</sup> Finally, the crimes "flight from the republic"

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bags of torn papers and files, 500 bags of documents had been manually reconstructed and 18 virtually reconstructed by 2016.

<sup>280</sup> In the FRG, the crime of trespassing was incorporated in Article 123 of the criminal law (§123 Strafgesetzbuch) Hausfriedensbruch: Wer in die Wohnung, in die Geschäftsräume oder in das befriedete Besitztum einen anderen oder in abgeschlossene Räume, welche zum öffentlichen Dienst oder Verkehr bestimmt sind, widerrechtlich eindringt oder wenn er, ohne Befugnis darin verweilt, auf die Aufforderung des Berichtigten sich nicht entfernt, wird mit einer Freiheitsstrafe von bis zu einem Jahr oder mit Geldstrafe bestraft. (crimes are those offences that are punishable with at least two years of imprisonment).

<sup>281</sup> Sauer, H., & Plumeyer, H.-O. (1991). *Der Salzgitterreport: die Zentrale Erfassungsstelle berichtet über Verbrechen im SED-Staat*. Muenchen: Bechtle. (p.255). See: The first official regulation: „Verordnung über Maßnahmen an der Demarkationslinie zwischen der Deutschen Demokratischen Republik und den westlichen Besatzungszonen Deutschlands,(26. Mai 1952). Afterwards, the regulation was altered every few years.

<sup>282</sup> The Preamble reads: "Durch diese Handlungen der amerikanischen, englischen und französischen Besatzungsmächte und der Bonner Regierung sieht sich die Regierung der Deutschen Demokratischen Republik gezwungen, Maßnahmen zu ergreifen, die die Verteidigung der Interessen der Bevölkerung der Deutschen Demokratischen Republik zum, Ziele haben und die ein Eindringen von feindlichen Agenten in das Gebiet der Deutschen Demokratischen Republik unmöglich machen."

<sup>283</sup> Paß-Gesetz der Deutschen Demokratischen Republik. Vom 15. September 1954, Article 8 reads: Wer ohne Genehmigung das Gebiet der Deutschen Demokratischen Republik nach dem Ausland verläßt oder aus dem Ausland betritt oder wer ihm vorgeschriebene Reiseziele, Reisewege oder Reisefristen oder sonstige Beschränkungen der Reise oder des Aufenthalts hierbei nicht einhält, wird mit Gefängnis bis zu drei Jahren bestraft. (2) Ebenso wird bestraft, wer sich für oder einen anderen durch falsche Angaben eine Genehmigung zum Verlassen oder Betreten der Deutschen Demokratischen Republik erschleicht.

<sup>284</sup> Article 21: Verleitung zum Verlassen der Deutschen Demokratischen Republik.(1) Wer es unternimmt, eine Person 1. im Auftrage von Agentenorganisationen, Spionageagenturen oder ähnlichen Dienststellen oder von Wirtschaftsunternehmen oder 2. zum Zwecke des Dienstes in Söldnerformationen zum Verlassen der Deutschen Demokratischen Republik zu verleiten, wird mit Zuchthaus bestraft; auf Vermögenseneinziehung kann erkannt werden. (2) Wer es unternimmt, einen Jugendlichen oder einen in der Berufsausbildung stehenden Menschen oder eine Person wegen ihrer beruflichen Tätigkeit oder wegen ihrer besonderen Fähigkeiten oder Leistungen mittels Drohung, Täuschung, Versprechen oder ähnlichen die Freiheit der Willensentscheidung beeinflussenden Methoden zum Verlassen der Deutschen Demokratischen Republik zu verleiten, wird mit Gefängnis nicht unter sechs Monaten bestraft.

(*Republikflucht*) and “unauthorised trespassing” were officially adopted under Article 213 of the Criminal Code of 1968.<sup>285</sup> Persons who wanted to leave the state were thus seen as refugees in West Germany, but designated as a *class enemy* or *traitor* in the GDR for not supporting the socialist state (Halbrock, 2015, p. 77).<sup>286</sup> The creation of an enemy and the de-humanisation of the opponent were both discussed in Chapter Three as relevant processes that enable individuals (and soldiers in particular) to overcome their natural resistance to hurting people.

While, on the one hand, the crossing of the border was criminalised, on the other hand, border guards were authorised to use (lethal) force to halt such *crimes* from occurring. Authorisation of immoral demands was a further *enabling mechanism* discussed in Chapter Three and included in the theoretical framework. The first firearms regulations were issued under the Soviet occupation, which permitted members of the then border police to use firearms against Soviet deserters attempting to leave the occupied territories, or against smugglers or bandits (Koop, 1996b, p. 35).<sup>287</sup> With the increased independence from the Soviet Union, the authority of the Ministry of Internal Affairs grew, and additional East German decrees officially regulated the use of firearms.

Among the numerous decrees and regulations about the use of firearms at the border, a few are selected here to demonstrate some relevant trends that occurred. For example, a 1952 Police Decree regarding the introduction of a special demarcation line prohibited transgression by ordinary persons and prescribed that the Stasi had to take more effective measures to officially “keep people out” (Sälter, 2009, p. 17).<sup>288</sup> In particular, Article 4 *allowed* for the use of firearms against persons who crossed the “control stripe” in either

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<sup>285</sup> Criminal Code of 1968, Article 213) (Straftaten gegen die staatliche und öffentliche Ordnung) reads: Ungezügelter Grenzübertritt Wer widerrechtlich in das Gebiet der Deutschen Demokratischen Republik eindringt oder sich darin widerrechtlich aufhält, die gesetzlichen Bestimmungen oder auferlegte Beschränkungen über Ein- und Ausreise, Reisewege und Fristen oder den Aufenthalt nicht einhält oder wer durch falsche Angaben für sich oder andere eine Genehmigung zum Betreten oder Verlassen der Deutschen Demokratischen Republik erschleicht oder ohne staatliche Genehmigung das Gebiet der Deutschen Demokratischen Republik verlässt oder in dieses nicht zurückkehrt, wird mit Freiheitsstrafe bis zu zwei Jahren oder mit Verurteilung auf Bewährung, (*ab 1974: Haftstrafe*), Geldstrafe oder öffentlichem Tadel bestraft. In schweren Fällen wird der Täter mit Freiheitsstrafe von einem Jahr bis zu fünf Jahren bestraft. Ein schwerer Fall liegt insbesondere dann vor, wenn die Tat durch Beschädigung von Grenzsicherungsanlagen oder Mitführen dazu geeigneter Werkzeuge oder Geräte oder Mitführen von Waffen oder durch die Anwendung gefährlicher Mittel oder Methoden durchgeführt wird; die Tat durch Missbrauch oder Fälschung von Ausweisen oder Grenzübertrittsdokumenten, durch Anwendung falscher Dokumente oder unter Ausnutzung eines Verstecks erfolgt; die Tat von einer Gruppe begangen wird; der Täter mehrfach die Tat begangen oder im Grenzgebiet versucht hat oder wegen ungesetzlichen Grenzübertritts bereits bestraft ist. Vorbereitung und Versuch sind strafbar.

<sup>286</sup> Political Criminals constituted the core of the political dictatorship, as the regime incarnated persons because of the political opinion they held, which did not officially exist, but other crimes (agitation, illegal attempt to cross the border (Borbe, 2010, p.13-14.) Estimated numbers of total political prisoners ranged from 150,000 to 200,000 (Borbe, 2010, p.16-17).

<sup>287</sup> SMAD Order NR. 0155 of Marshall Sokolowski von the 23<sup>rd</sup> of August 1947.

<sup>288</sup> “The official decree talks about the threat from the West and how spies have to be kept out of the territory. It was part of the rhetoric. In fact, it was intended to keep people in. No one was allowed near the border (control strip) (Sälter, 2009, p. 18).

direction.<sup>289</sup> The early versions of the decree stated that firearms were to be used to halt persons attempting to cross. Two years later, Police Order 19/54 then *prescribed* the use of firearms in order to halt border crossers.<sup>290</sup>

In the following years, the firearms regulations were changed between “*having to*” and “*being allowed to*” use firearms. For instance, the 1958 extensive work regulations “Dienstvorschrift für den Dienst der Grenzposten”, was more explicit about the instances in which firearms were permitted to be used. Article 207 prescribed that “members of the German Border Police are *allowed* to use firearms in cases of self-defence or to ward off armed attacks on the order of the State and its establishments, if the attack cannot be successfully averted otherwise.”<sup>291</sup> More interestingly, Article 208 stipulated that “members of the German Border Police at the border towards the West, around Berlin and at the coastline are also *allowed to* use firearms in addition to the cases listed under point 207 in the following cases:

- A) to warrant the territorial integrity (literal translation: inviolability) of the borders and to defend the sovereign territory of GDR, during armed attacks, or during assaults of individual persons or groups of subversive (staatsfeindlich) and criminal elements.
- B) during the arrest of spies, saboteurs, agitators and other criminals, if the arrest is opposed with armed resistance or when they take flight, ignore a warning shot and there is no possibility to achieve an arrest by relying on other qualified means.”<sup>292</sup>

The 1958 Firearms Regulation has no obvious illegal elements in the way the order was formulated. Most importantly, the order *allowed* members of the border police to use firearms in the below listed cases, rather than *prescribing* the use of weapons. Yet, the crucial distinction revolves around the term “criminal”, as discussed above.

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<sup>289</sup> “Das Überschreiten des 10 m Kontrollstreifens ist für alle Personen verboten. Personen, die versuchen den Kontrollstreifen in Richtung der Deutschen Demokratischen Republik oder Westdeutschland zu überschreiten, werden von den Grenzstreifen festgenommen. Bei Nichtbefolgung der Anordnung der Grenzstreifen wird von der Waffe Gebrauch gemacht.

<sup>290</sup> Artikel 54: Von der Schusswaffe muss gebrauch gemacht werden in Fällen, ...(c) bei Fluchtversuchen Festgenommener oder der Festnahme unterliegender Personen, wenn alle anderen Möglichkeiten zur Festnahme erschöpft sind (Sälter, 2009, p.164).

<sup>291</sup> Article. 207 reads: Die Angehörigen der Deutschen Grenzpolizei sind berechtigt, in den Fällen der Notwehr oder zur Abwehr von bewaffneten Angriffen auf die staatliche Ordnung und ihre Einrichtungen von der Schusswaffe Gebrauch zu machen, wenn ein Angriff mit anderen Mitteln nicht mehr erfolgreich abgewendet werden kann.

<sup>292</sup> Article 208 reads: Die Angehörigen der Deutschen Grenzpolizei an der Staatsgrenze zur Westzone, am Ring um Berlin und an der Küste können außer den in Ziffer 207 aufgeführten Fällen von der Schusswaffe Gebrauch machen. A) zur Gewährleistung der Unantastbarkeit der Grenzen und zur Verteidigung des Hoheitsgebietes der Deutschen Demokratischen Republik, bei bewaffneten Angriffen oder Überfällen von Einzelpersonen oder Gruppen staatsfeindlicher und krimineller Elemente. B) Bei der Festnahme von Spionen, Saboteuren, Provokateuren und anderen Verbrechern, wenn die der Festnahme bewaffneten Widerstand entgegensetzen oder die Flucht ergreifen, einen Warnschuss unbeachtet lassen und keine Möglichkeit besteht, die Festnahme durch eine andere qualifizierte Maßnahme herbeizuführen.

As scholars of the border regime have noted, earlier official regulations were modified numerous times, mainly on the issue of permission versus obligation to use firearms to prevent and stop “crimes” from occurring (Sälter, 2009, p. 162). The final firearms regulations were adopted under the 1982 State Borders Acts (*Grenzgesetz*) (March 25<sup>th</sup>) Section 27 Use of Firearms:<sup>293</sup>

The use of firearms is the most extreme measure entailing the use of force against the person. Firearms may be used only where the resort to physical force (*körperliche Einwirkung*), with or without the means of mechanical aids, has been unsuccessful or holds out no prospect of success. The use of firearms against persons is permitted only where shots aimed at objects or animals have not produced the result desired.

The use of firearms is justified to prevent an imminent commission or continuation of an offence (*Straftat*), which appears in the circumstances to constitute a serious crime (*Verbrechen*). It is also justified in order to arrest a person strongly suspected of having committed a serious crime.

The use of firearms must in principle be preceded by a shouted warning or warning shot, save where imminent danger may be prevented or eliminated only through targeted use of the firearm.

Firearms must not be used when:

- the life or health of third parties may be endangered,
- the persons appear, from the outward aspect, to be children; or
- the shots would impinge on the sovereignty of a neighbouring state.

When firearms are used, human life should be preserved where possible. Wounded persons must be given first-aid, subject to the necessary security measures being taken.

On paper, these regulations to use firearms do not differ significantly from the West German approach (see Appendix 3), especially since the regulations stress that firearms are to be used as a last resort in Article 27 (1). Yet, the fact that life should be spared *where possible* in 27 (4) suggests that sparing lives was not necessarily a priority (otherwise it would have been

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<sup>293</sup> (1) Die Anwendung der Schusswaffe ist die äußerste Gewaltanwendung gegenüber Personen. Die Schusswaffe darf nur dann angewendet werden, wenn die körperliche Einwirkung ohne oder mit Hilfsmitteln erfolglos blieb oder offensichtlich keinen Erfolg verspricht. Die Anwendung von Schusswaffen gegen Personen ist erst dann zulässig, wenn durch Waffenwirkung gegen Sachen oder Tiere der Zweck nicht erreicht wird.

(2) Die Anwendung der Schusswaffe ist gerechtfertigt um die unmittelbar bevorstehende Ausführung oder Fortsetzung einer Straftat zu verhindern, die sich den Umständen nach als ein Verbrechen darstellt. Sie ist auch gerechtfertigt zur Ergreifung von Personen, die eines Verbrechens dringend verdächtig sind.

(3) Die Anwendung der Schusswaffe ist grundsätzlich durch Zuruf oder Abgabe eines Warnschusses anzukündigen, sofern nicht eine unmittelbar bevorstehende Gefahr nur durch die gezielte Anwendung der Schusswaffe verhindert werden kann.

(4) Die Schusswaffe ist nicht anzuwenden, wenn (a) Das Leben oder die Gesundheit Unbeteiligter gefährdet werden könnte, (b) Die Personen dem äußeren Eindruck nach im Kindesalter sind, oder (c) Das Hoheitsgebiet des benachbarten Staates beschossen würde. Bei der Anwendung der Schusswaffe ist das Leben von Personen nach Möglichkeit zu schonen. Verletzten ist unter Beachtung der notwendigen Sicherheitsmaßnahmen Erste Hilfe ist zu erweisen.

emphasised (e.g.: *life must be spared at the highest cost*). Article 27(2) allows the use of firearms for preventing crimes, halting crimes and, notably, in situations that “*appear in the circumstances to constitute a serious crime*”, a pivotal phrase which allows considerable room for error when using firearms.<sup>294</sup> Most importantly, the regulations leave room for interpretation.

The criminalisation of leaving East Germany and the firearms regulations constitute the official pillar of the legal foundation that led to the shooting of East Germans. The second “unofficial” pillar comprises the politburo’s actual intention with the law and the way it was interpreted and applied, namely, to keep people in East Germany, to punish those who wanted to leave, and to deter people from considering leaving. Disclosed classified Stasi and National Security Council documents shed more light on the politburo’s intention, secret orders as for example Order 101/64, which prescribes that transgressor have to be killed if they can not be stopped (Koop, 1996a, p. 250). Other examples include the retrieval of a document in 2007 dating from 1973, which was found among Stasi files, clearly instructing former guards not to hesitate and to shoot to kill at escapees, even if they were women or children, thus showing that unofficial communications instigated a less restricted use of firearms than the official regulations suggest.<sup>295</sup>

The actual application and interpretation of the Border Laws is further reflected in statements such as “trespassing of the border must be completely foreclosed,... everywhere there must be a direct line of fire possible”, which comes from then General Secretary Erich Honecker in a secret National Security Council meeting in 1974 (Schultke, 2008, p. 80). The SED rhetoric suggested that the actual intentions of the SED did not only include halting the border crossers (by any means), but also involved punishing them for trying and deterring others who may seek to in the future: in 1964, General Hoffman of the NVA proclaimed that “whoever does not respect the borders of the GDR, will experience the bullet”.<sup>296</sup> Similarly, as outlined in an eleven-point programme summarising the meeting of the National Security Council on 20<sup>th</sup> September 1961 under point eight: firearms *are to be used* against traitors and violators of the border (Koop, 1996, p.181).<sup>297</sup> The (more or less secret) rhetoric of the SED leadership about firearms regulations sheds light on why the firing orders differed from comparable regulations, in which life was spared at all costs (rather than life being spared where possible) and why they have been considered illegal.<sup>298</sup>

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<sup>294</sup> See footnote 294.

<sup>295</sup> “Zögern Sie nicht mit der Anwendung der Schusswaffe, auch dann nicht, wenn die Grenzdurchbrüche mit Frauen und Kindern erfolgen”, Stasi Dienstanweisung, October 1<sup>st</sup> 1973 (Spiegel, 2007).

<sup>296</sup> “Wer die Grenzen der DDR nicht respektiert, bekommt die Kugel zu spüren”. See reference list, internet sources.

<sup>297</sup> “Gegen Verräter und Grenzverletzer ist die Schusswaffe anzuwenden”.

<sup>298</sup> A secret document prescribed keeping orders and instructions regarding all border related issues a secret matter. Bormann noted: “The command hierarchy was left intentionally vague, confidentiality was a priority, while the public was not informed about border crossings. Secrecy about incidents was ensured by taking injured people at the border clandestinely to special designated hospitals, even though this created an additional health hazard to the injured person.” (Bormann, 2015, p. 188).

Furthermore, border guards received daily oral instructions in which more details about the mission were explained.<sup>299</sup> This “*Vergatterung*” left commanders with additional room for interpretation of the firearms regulations, which were also adjusted to meet the actual political context (Sälter, 2009, p. 169). At times, the legal details of the instructions were purposefully left ambiguous and not explicitly laid out to the guards, yet emphasis was placed on the correctness of the orders and need to prevent escapes by all means as well as on the fact that disobedience would be punished (Sälter, 2009, p. 169).

These daily instructions constituted a more accessible reference point for the border guards than the regulations on paper, especially if one considers that the regime kept official documents regarding the orders and events that occurred at the wall classified. If instructions regarding the use of firearms were kept vague and guards were punished for each successful escape (which will be discussed in greater detail in section 6.2.3), but not punished or even held accountable for each death at the border, then this clearly sent a strong message to guards about their decision to use lethal force (Sälter, 2009, p. 171). In addition to the vague and complex legal foundation and actual interpretation of the standing order to use force, there were also cases in which the use of force was literally requested, as in the case mentioned in the introduction when Ingo S. was ordered to shoot.

The issue of illegality of the “firing order” is not uncontested when reference is made to the standing orders, i.e. laws through which a mandate was given to the guards to use lethal force to halt those who wanted to leave. The official regulations on paper were lawful according to GDR law as these did not instruct to *shoot to kill*, but rather instructed to *shoot as a last resort* to prevent a crime from occurring. By contrast, the actual intention and application of lethal force was not legal for (at least) two reasons: the criminalisation of the attempt to leave an oppressive regime is incommensurable with the human right to travel freely, and furthermore, this policy of killing so called “criminals” not only negates escapees’ right to life, but also deprives escapees of their right to fair trial.

Preventing one’s own citizens from travelling (and moving) across the border is not in line with people’s freedom of movement, a right which is granted by the International Covenant on Civil and Political Rights (ICCPR)– Article 12(2) right to free movement, which posits that “Everyone shall be free to leave any country, including their own”.<sup>300</sup> The ICCPR was

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<sup>299</sup> The daily oral instructions given to border guards was reported as follows: troop unit (Zug) X is guarding from ... until .. to protect the national border of the GDR in the part (Abschnitt X) der Kompanie mit dem Auftrag, Grenzverletzter in beiden Richtungen vorläufig festzunehmen *oder* durch Anwendung der Schusswaffe unschädlich zu machen. Zug X Stillgestanden, Vergatterung” (Sauer & Plumeyer, 1991, p. 68).

<sup>300</sup> While there was a clear derogation by the GDR, politburo members could argue that Article 12.3 grants permission: 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and shall be presented for the purpose before the competent authority or person or persons especially designated by the competent authority.

signed but not ratified by the GDR in 1976.<sup>301</sup> By “incarcerating” its citizens in the GDR and enforcing its political system, the SED also took away the human rights of (political) free-will and freedom of expression (Article 1 and Article 19.2 of the ICCPR, respectively).

Furthermore, even if the escapees were violating the border laws by trespassing into restricted territory, using lethal force to halt trespassers appears to infringe upon the escapees’ right to life and right to fair trial (if one accepts that the border crosser violated criminal law by trespassing), as laid out in Articles 6 (1) and 14 (1 and 2) of the ICCPR respectively. While the ICCPR grants every person the right to life in Article 6 (1): “Every human being has the inherent right to life”,<sup>302</sup> one could argue that the escapee (knowingly) broke GDR border law and therefore became a criminal offender. Yet, if this line of argument is accepted, Article 14 (1) of ICCPR stipulates that ... “everyone (who has been charged with an offence) shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law” and Article (2) prescribes that: “everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law”.

In practice, the border policies applied in the GDR could therefore be described as a standing violation of the ICCPR. Yet, in theory, politburo members justified the restriction of rights as a necessary means through which to ensure public order and security (Münkel, 2016, p. 130). Had the population flight not been stopped and the political opposition not been suppressed, the politburo argued, the GDR would be at risk of ceasing to exist, which in the eyes of the SED was a major threat to national security (Sälter, 2007, p. 1).<sup>303</sup>

In cases of excessive force, i.e. the guards were ordered to use lethal force after the refugee had already been captured and thus could by no means pose a threat to the guards, the shooting (order) can be considered to be *manifestly* illegal. In this case, the firing arms regulations did not prescribe or allow for the use of lethal force against captured persons, and it should have been considered murder, also according to GDR law. Accordingly, these cases were illegal and unlawful, because, as discussed in Chapter One, they constituted a crime (murder) and were not authorised by the border regulations. Yet, in practice, shootings successfully halting escape attempts were not investigated (Rosenberg, 1996, p. 287).

By contrast, in cases in which refugees were not in custody when lethal force was used, but when lethal force was used to halt the border crosser, the illegality of the shooting order is *less* obvious, as the use of force and practice were sanctioned (and desired) by the authority. As discussed in Chapter One, a distinction can be drawn between illegal and wrongful. As will be discussed below, in the case that guards used lethal force to halt a “criminal”, their

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<sup>301</sup> Yet, it was not adopted by the Volkskammer. One could argue (and the German Constitutional Court did) that the ICCPR constitutes International Customary Law, as it had been ratified by the majority of states, including the GDR.

<sup>302</sup> The article continues: This right shall be protected by law. No one shall be arbitrarily deprived of his life.

<sup>303</sup> Sälter stated: “Durch das etablierte Grenzregime und den Mauerbau wurden der Bevölkerungsverlust durch Abwanderung eingedämmt, die Souveränität der DDR bekräftigt.... Damit wurde das Grenzregime zu einer wesentlichen Bedienung von Herrschaft und sozialem Leben in der DDR”.

orders could be considered lawful within the context of GDR law, but at the same time illegal from an international law or natural law perspective.<sup>304</sup> This is because the GDR legislation authorised the use of force, in which case the duty to disobey may be more difficult to grasp than in cases in which the order (also) violates national legislation. The subsequent section offers an overview of the proceedings against shooters and summarises how judges perceived the illegality of the orders, before moving onto examine the former guards' duty to disobey.

### 6.1.3. The duty to disobey

In section 6.1.2, it was discussed that the orders the border guards received were lawful according to GDR law. Yet, as soldiers have in a later stage been held criminally accountable for obeying orders, the orders were also considered illegal, at least in retrospect. Many academics, however, have heavily criticised holding individual border guards criminally accountable for reprehensible acts that were legal under GDR law (Adams, 1992-1993; Ambos, 1997; Arnold et al., 2003; Dreier, 1997; Quint, 2000; Walther, 1993).

Members of the armed forces, also in the GDR, have to obey orders. In particular, Article 35 of the 1957 Additional Criminal Code stipulated that a soldier "who does not follow an order given by a superior, or refuses to carry out an order and thereby causes a significant disadvantage for the discipline, training or readiness of the unit, will be punished with a prison sentence."<sup>305</sup> The article continues by including a paragraph about soldiers "who do not carry out an order which is incommensurable with criminal or international law, or against the human dignity of members of the GDR, will not be legally punished".<sup>306</sup> Accordingly, the GDR also applied the manifest illegality rule.

The law from 1957 was replaced with the 1968 Criminal Code (albeit the relevant articles remained unchanged), in which military disobedience was incorporated under Article 257 under the heading *refusal to carry out orders*.<sup>307</sup> Interestingly, in 1968, the law also stated

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<sup>304</sup> According to positive law, the shooters' actions were perfectly lawful and in line with the firearms regulations at that time. Therefore, the defense argued that guards did not have a duty to disobey and the trials violated the legal principle of *nullum crimen sine lege* and *nulla poene sine lege*. The issue of retroactivity (as Article 103 of Grundgesetz guarantees) was avoided by the Landgericht, for example, by stating that manslaughter also was a criminal act according to GDR law (as stated in Article 113 of the 1968 Criminal Code). Along those lines, it has been argued that the shooters should not rely on the excuse *nulla poene sine lege* principle. Yet, others argued that because the entire system was unjust (Unrechtsstaat), and the jurisdiction was an organ of the political repression, then one cannot pick and choose which laws of the injustice system are valid (Ambos, 1997).

<sup>305</sup> (1) Wer einen von einem Vorgesetzten erteilten Befehl nicht ausführt oder die Ausführung des Befehls verweigert und dadurch einen erheblichen Nachteil für die Disziplin, Ausbildung oder Einsatzfähigkeit der Einheit herbeiführt, wird mit Gefängnis bestraft. Gesetz zur Ergänzung des Strafgesetzbuches - Strafrechtsergänzungsgesetz - vom 11. Dezember 1957.

<sup>306</sup> „Wer einen Befehl nicht befolgt, dessen Ausführung gegen die Strafgesetze oder gegen das Völkerrecht verstoßen oder die im Arbeiter-und-Bauern-Staat geltende Achtung des Menschen verletzen würde, bleibt straffrei.“

<sup>307</sup> Article 257: Befehlsverweigerung und Nichtausführung eines Befehls. (1) Wer die Ausführung des Befehls eines Vorgesetzten verweigert, wird mit Freiheitsstrafe bis zu fünf Jahren oder mit Verurteilung auf Bewährung oder mit Strafhaft bestraft. (2) Ebenso wird bestraft, wer den Befehl eines Vorgesetzten nicht, unrichtig oder nicht vollständig ausführt. (3) Wer die Tat im Verteidigungszustand begeht, wird mit Freiheitsstrafe nicht unter einem Jahr bestraft.



that border guards must follow orders and carry out *regulations*: Article 262 under *violation of the regulations regarding the securing of the border* specifically stipulates that (1) “who, as a member of the border guards, violates the regulations or other instructions regarding the securing of the border, will be sentenced up to five years in prison, with or without suspended sentences, or with incarceration.”<sup>308</sup>

It was not only made clear that border guards had to obey orders, the 1968 Criminal Code also included a section that restricted individual criminal liability in Article 258 (1) “Members of the armed forces shall not be held criminally responsible for acts committed under an order issued by a superior, save where the execution of the order manifestly violates the recognised rules of public international law or a criminal state”. Moreover, Article 258 (3) stated that: “Criminal responsibility shall not be incurred for refusal or failure to obey an order whose execution would violate the recognised rules of public international law or a criminal statute”.<sup>309</sup> Furthermore, Article 95 “Exclusion of Due Obedience” establishes criminal liability not only for members of the military but for all members of society, in cases, in which “any person whose conduct, based on an order or written instruction, violates human or fundamental rights, international obligations, ... may not plead due obedience in justification and shall be held criminally responsible”.<sup>310</sup>

Whilst individual criminal responsibility existed for all individuals in cases in which orders were obviously not in line with the norms of international law, criminal law, and, interestingly before 1957, also *orders that violate human dignity*, the reference to human dignity was left out of the successors to the 1957 Addition to the Criminal Code. As discussed in Chapter One, the existence of individual criminal liability can indirectly create a duty to disobey orders, even though such a duty to disobey illegal orders is not made explicit in many cases. On paper, former guards in the GDR indeed could have been prosecuted for obeying orders, especially in cases of excessive force. As suggested in Chapter One, one can also point towards a theory-practice dichotomy regarding soldiers’ duty to disobey in East Germany: legally, they had a duty to disobey, yet, in practice, the military did not require disobedience to illegal orders.

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<sup>308</sup> Article 262. Verletzung der Dienstvorschriften über die Grenzsicherung: (1) Wer als Angehöriger der Grenztruppen Dienstvorschriften oder andere Weisungen über die Grenzsicherung verletzt, wird mit Freiheitsstrafe bis zu fünf Jahren oder mit Verurteilung auf Bewährung oder mit Strafarrrest bestraft. (2) Wer die Tat im Verteidigungszustand begeht, wird mit Freiheitsstrafe nicht unter einem Jahr bestraft.

<sup>309</sup> Article 258. Handeln auf Befehl: (1) Eine Militärperson ist für eine Handlung, die sie in Ausführung des Befehls eines Vorgesetzten begeht, strafrechtlich nicht verantwortlich, es sei denn, die Ausführung des Befehls verstößt offensichtlich gegen die anerkannten Normen des Völkerrechts oder gegen Strafgesetze. (2) Werden durch die Ausführung eines Befehls durch den Unterstellten die anerkannten Normen des Völkerrechts oder ein Strafgesetz verletzt, ist dafür auch der Vorgesetzte strafrechtlich verantwortlich, der den Befehl erteilt hat. (3) Die Verweigerung oder Nichtausführung eines Befehls, dessen Ausführung gegen die anerkannten Normen des Völkerrechts oder gegen Strafgesetze verstoßen würde, begründet keine strafrechtliche Verantwortlichkeit.

<sup>310</sup> Article 95. Ausschluß des Befehlsnotstandes: Auf Gesetz, Befehl oder Anweisung kann sich nicht berufen, wer in Mißachtung der Grund- und Menschenrechte, der völkerrechtlichen Pflichten oder der staatlichen Souveränität der Deutschen Demokratischen Republik handelt; er ist strafrechtlich verantwortlich.

After the German re-unification, members of the politburo and the military were held accountable during the so called Politburo- and “Mauerschützenprozesse” (border guards trials). By holding former guards who shot escapees responsible for their obedience, judges sent the message that they believed that border guards should not have killed ordinary persons attempting to cross the border (which is why they were sentenced). Yet, in most cases, the sentences were suspended, thus indicating that the judges took into account that shooters in many cases were in a difficult situation. While commentators criticised most of the courts’ arguments, they generally agreed with the outcome of the judgments of the border guard trials.

The criminal proceedings against 469 former border guards<sup>311</sup> took place between 1991 and 2004 and led to 270 judgments on the use of lethal force, with most shooters’ sentences being suspended on probation, while 67 guards were found not guilty (Buchholz, 2005, pp. 357-358). Appendix 3 illustrates the case of former guard K-H. W., who was convicted by the Regional or District Court (Landgericht Berlin), sought revision at the Federal Court of Justice (Bundesgerichtshof, or BGH), the Federal Constitutional Court (Bundesverfassungsgericht) and finally the European Court of Human Rights, all of which upheld the judgment of the District Court.

In other proceedings, various courts applied different lines of argument, and relied on various sources in their attempt to establish individual criminal liability (Quint, 2000).<sup>312</sup> The three following lines of argument formed the basis of most of the judgments:

- (1) using lethal force to halt civilian fugitives is not in proportion with the people’s right to life and the freedom of movement according to international law, therefore guards had a duty to disobey;
- (2) the *Radbruch formula* or natural law argument was applied, according to which the positive law that legalised the shooting of civilians was *so* reprehensible that the law must be considered null and void. This meant that the guards’ orders to shoot had no legal basis, were *clearly illegal* and thus the guards had a duty to disobey;
- (3) Knowing that an order is wrongful or illegal alone can establish a duty to disobey. Because some guards knew the shooting was wrongful and felt guilty about carrying it out, and/or because they knew that the “crimes” were registered (and, in

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<sup>311</sup> Of which 227 were soldiers, 242 were officers, 29 were generals in the NVA, 15 were generals and officers of other security authorities and 16 were SED leaders (Buchholz, 2005, pp. 357-358).

<sup>312</sup> Quint (2000) identified seven different reasonings the courts relied on when establishing guards’ individual criminal responsibility for shootings, which are reorganised into three points here to save space (as they are overlapping).

part, prosecuted) by West German authorities.<sup>313</sup> Each of these distinct lines of argument are briefly discussed below.

(1) The first argument posits that the SED's claim to protect its sovereignty and use lethal force to do so was disproportionate to people's right to life (Article 6 of the ICCPR).<sup>314</sup> This argument was at its strongest in those cases where *obvious excessive* force was applied, such as, for example, when the escapee was not only clearly a civilian, but had already been captured by the guards and, as such, no longer posed a threat to the guards or to the sovereignty of the state. Using this line of argument, the Landgericht Berlin went beyond cases in which the escapee was already captured and held that the shooting of a young escapee using a ladder to climb over the wall, who did not respond to calls and warning shots, was also not proportionate. The court concluded that the right to life is more important than the halting of a "criminal", who did not endanger someone else's life at that point in time (LG Berlin, NSTZ 1992, 492, 493) (Alexy, 1999, p. 21). For persons who merely wanted to reunite with their families in West Germany or who wanted to live a free life in West Germany, the criminalisation and use of lethal force to prevent their escape was, according to the court, not in proportion with their right to life.

This argument establishing a duty to disobey is less convincing in those cases in which it was not clear whether the escapee had in fact posed a threat. Furthermore, the Bundesgerichtshof also relied on this line of argument when it contended that preventing citizens from travelling (and moving) across the border was not in line with people's right to free movement, as per Article 12(2) of the ICCPR, which stipulates that "Everyone shall be free to leave any country, including his own."<sup>315</sup> This argument has been rejected by those who determined the restriction of rights as a necessary means through which to ensure public order and security (Münkel, 2016, p. 130).<sup>316</sup> Additionally, it has been argued that a duty to disobey (in the form of individual criminal responsibility) exists only if the guard in question is aware of the norms of international law which the orders he received are in breach of. One may argue that to a nineteen-year old conscript, a violation of the norms of international law, such as the ones formulated in ICCPR, is less than obvious. Even if Article 95 of the Criminal Code established individual criminal responsibility according to GDR law, guards may not have

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<sup>313</sup> While Quint refers to seven arguments, this research combines the arguments according to their sources (International and domestic, positive law, natural law, and the shooters' knowledge of its wrongfulness).

<sup>314</sup> One must not forget that there are also instances in which the use of firearms is perfectly legal, such as, for example, in cases of self-defence or when guards had good reason to believe that the trespasser was dangerous or armed.

<sup>315</sup> While there was a clear derogation by the GDR, politburo members could argue that Article 12.3 grants permission: 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and shall be presented for the purpose before, the competent authority or a person or persons especially designated by the competent authority).

<sup>316</sup> Had the population halt not been stopped, and the political opposition not been suppressed, the GDR would be at risk of ceasing to exist, which in the eyes of the SED was a major threat to national security (Sälter, 2007, p. 1). Sälter stated: "Durch das etablierte Grenzregime und den Mauerbau wurden der Bervölkerungsverlust durch Abwanderung eingedämmt, die Souveranität der DDR bekräftigt.... Damit wurde das Grenzregime zu einer wesentlichen Bedienung von Herrschaft und sozialem Leben in der DDR".

been aware of that specific article, as opposed to the content of the above-described Articles 213 and 262.<sup>317</sup>

(2) The second argument grounds the duty to disobey in the so called Radbruch formula.<sup>318</sup> According to this approach, positive law, including the border guards firearms regulations, is limited by morality, and extreme forms of injustice cannot be legal (Alexy, 1999, p. 17). Hence, irrespective of the GDR's actual obligations under international law and GDR law, guards nevertheless had a duty to disobey, because the orders were extremely wrongful in and of themselves.<sup>319</sup> This natural law argument holds that the laws of a regime can be so reprehensible that they override the principle of non-retroactivity (Quint, 2000, p. 545).

Accordingly, young conscripts, who endured military indoctrination and political indoctrination *should* nevertheless have known that their orders were wrongful, precisely because the orders were so reprehensible. Article 213 of the Criminal Code (as well as its predecessor Paßgesetz in 1954) (which made the attempt to leave the GDR a criminal offence) was itself extremely unjust ("extremes Unrecht"), and was therefore considered null and void based on the formula of Radbruch (Dreier, 1997, p. 424).<sup>320</sup> Hence, if the positive law that legalises the use of lethal force is declared null and void, then the shootings are indeed illegal.

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<sup>317</sup> One could argue that holding individual border guards criminally accountable is wrong because the International Covenant on Civil and Political Rights is a contract between states, but does not automatically grant citizens their rights. Even though the ICCPR was ratified by the GDR, it had not been adopted by the Volkskammer (which is necessary according to Article 51 II of GDR Basic Law). Yet, The Bundesgerichtshof argued that the lack of adoption into national law did not exempt the GDR from its international obligations (Dreier, 1997, p. 425). Dreier, among many others, argued that the illegality of the denial to travel freely (Article 12 ICCPR) did not suffice to establish individual criminal responsibility for East German Border guards. Hence, according to him, the second argument did not establish a legal duty to disobey. Interestingly, for a case dealing with the shooting of an escapee that occurred prior to 1974, the BGH relied upon the 1948 Universal Declaration of Human Rights (In particular Article 3 and Article 13.2) While some argue that, as the title implies, UDHR constitutes a declaration, alternatively one could argue that the UDHR constitutes an international norm and therefore a *ius cogens* principle (ibid.).

<sup>318</sup> Dyzenhaus translated the formula as follows: "The conflict between justice and legal certainty should be resolved in that the positive law, established by enactment and by power, has primacy even when its content is unjust and improper. It is only when the contradiction between positive law and justice reaches an intolerable level that the law is supposed to give way as a 'false law' (unrichtiges Recht) to justice. It is impossible to draw a sharper line between the cases of legalised injustice and laws which remain valid despite their false content. But another boundary can be drawn with the utmost precision. Where justice is not even aimed at, where equality- the core of justice- is deliberately disavowed in the enactment of a positive law, then the law is not simply 'false law', it has no claim at all to legal status." (Alexy, 1999, p. 16).

<sup>319</sup> In Germany, the formula of Radbruch became prominent in debates about how to deal with the Nazi past, in which blatantly unjust laws became lawful (positive law). In such cases, the criminal prosecution of those who acted upon such wrongful laws became retroactively possible after 1945, and yet again, in the 1990s. Radbruch's legal philosophy arose out of the Nazi crimes, while the crimes committed by the SED are hardly comparable to the Holocaust, due to the magnitude of victims, limited intent of the shooters, and the absence of genocidal intent. But even if it is obvious that a comparison is not appropriate, some argued, the firing order was sufficiently reprehensible (Quint, 2000, p. 546).

<sup>320</sup> The court indeed pointed out that the gravity of the injustice of Nazi mass murder cannot be equated with the shooting of border crossers at the inner German border, but that "in judging deeds done at the command of the state one has to take into account whether the state has crossed the outer limits which are ordained to it by general convictions in any country" (Alexy, 1999, p. 22).

(3) The third line of argument made by various judges grounded the duty to disobey either on expressed feelings of guilt or knowledge about the wrongfulness of the orders received (Quint, 2000, pp. 546-547). The judges who used this argument believed it to have been *obvious* to the recipients of the order that the law was either not in line with the norms of international law, criminal law, or that it violated human dignity. For example, it was argued in the BGH that guards were well aware of the wrongfulness of their orders and the possibility of being held accountable.<sup>321</sup> While the knowledge of illegality of an order is indeed relevant for the manifest illegality rule, in most armies, the perception of wrongfulness of orders may not influence soldiers' decision to refuse to obey, with the exception of the moral objection embedded in West German military law, which was discussed in Chapter One. The third argument adds an interesting subjective aspect to the discussion. According to the manifestly illegality rule discussed in Chapter One, knowing that one's order is wrongful and or illegal excludes one's reliance on the defence of superior orders. Yet, in practice, it must be proven that the guard in question knew that the order was illegal in order to establish his duty to disobey.

Aside from cases of excessive force, in which shooters could have been (but in fact were not) tried under GDR law (Quint, 2000, p. 558), and cases where lethal force was indeed legal (if the escapee was obviously armed), border guards were faced with a complicated version of the aforementioned soldier's dilemma. The arguments that establish the duty to disobey are either based on what the soldier should have known or on what he perceived to be wrongful, namely, the norms of international law, a natural law threshold of absolute wrongfulness, and feelings of guilt or knowledge of their illegality.

German municipal and federal courts, as well as the Supreme Court and the European Court of Justice confirmed in their respective judgments that border guards indeed carried individual criminal liability for shooting escapees (Arnold et al., 2003). As discussed above, many judges argued the orders were manifestly and obviously illegal.

The judgments suggest that the guards should have exhausted all other means before risking killing clearly unarmed persons. Judge Tepperwin literally said that the guards should have shot with the conscious intent to miss the person (Quint, 2000, p. 298). The judge's reference to secret conscientious disobedience reinforces the necessity of further studying the evasive behaviour of soldiers who have received firing orders.

While it can be argued that the guards had a duty to disobey *if* they were or could have been aware of the absolute wrongfulness of the order, this absolute moral wrongfulness might not have been completely self-evident in all cases (see section 6.2.2). Moreover, the individual soldier's awareness or feeling may not be strong enough to compel young men in the military institution to disobey orders, especially given that these orders were lawful according to GDR

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<sup>321</sup> According to those who rely on this argument, knowledge of wrongfulness justifies the perceived retrospective justice. See, 2 BGHst 234, 238-40 (1952).

law and because the system's judicial system was not independent from the political regime. The fact that the sentences in most Mauerschützen trials were suspended on probation shows that the courts did take these attenuating circumstances into account (Walther, 1993, pp. 113, 118). Indeed, in practice, the environment was conducive only to obedient and conformist behaviour. Factors that specifically contributed to obedience in East Germany and how the SED attempted to install conformity among the border guards will be discussed in the next section.

## **6.2. Factors contributing to obedience and conformity in East Germany**

Why did former guards conform to the norm and why did they obey wrongful orders? As discussed in Chapter Two, an individual facing an illegal or immoral demand, or who encounters behaviour of the surrounding group that they do not agree with, is influenced by environmental and social factors and internal processes, which interact to produce either conformist and obedient behaviour or dissidence. The present section examines those factors that likely influenced former guards' obedience and conformity.

As discussed above, the GDR was governed by a party dictatorship which demanded full adherence to the ideal socialist world in which, in theory, there should have been zero nonconformity, disobedience, or criminality (Halbrock, 2015, p. 77). In practice, however, the former regime not only adapted laws that increased adherence to socialism, but also utilised social forces to increase obedience and conformity among the people, as discussed in Chapter Two. The party leadership demanded strict conformity to the "socialist ideal", while political opponents of the system were punished for their nonconformity. These punishments ranged from being ostracised, to being professionally disadvantaged, up to being imprisoned in the case of politically active individuals (Halbrock, 2015, pp. 77-78).

The state aimed at eliminating dissidence and created a highly sophisticated spying network, whereby both official and unofficial spies reported on their neighbours, friends and colleagues, while at times even spouses reported on each other. In addition to spying on individuals, the East German State aimed at indoctrinating its citizens. Of particular interest for the study of former guards presented in this chapter is the way the military institution (including the border police) attempted to influence guards, for example, by controlling dissidents' access to buying or renting houses, careers and even intervening in people's private lives (Rosenberg, 1996, pp. 288-289). Indoctrination of the socialist ideology and glorification of the military began as early as preschool, through the glorification of the army in songs and military-esque greetings, as well as children being encouraged to play with military toys (Schultke, 2008, pp. 89-99).

Military indoctrination continued during school years: children learned drills, internalised rhetoric such as "community before individual", and had to present themselves in a drill-like manner by calling out "always prepared!" (Schultke, 2008, p. 99). In 1978, the subject of

military education was taught to all students at the age of 13, while the majority of students also joined the association “Free German Youth”, not necessarily out of their free-will (Schultke, 2008, p. 99). Obedience and conformity to the political agenda were to be internalised, and indeed a number of East Germans did believe in socialism (and still do) (Rosenberg, 1996, p. 277).<sup>322</sup>

In addition to the SED’s attempts to indoctrinate and instil conformity in society, all members of the military and security apparatus had to be trained accordingly, as discussed in Chapter Three. In East Germany, the following main factors contributed to border guards’ obedience and conformity: the law (firearms regulations) authorised the use of lethal force; a pre-selection of “suitable” candidates and military training aimed at automatizing obedience and political indoctrination; individuals were punished (or threatened) with punishment; and finally, moral disengagement mechanisms contributed to guards’ obedience.

### 6.2.1. Authorisation of lethal force

As members of the military and police, former guards had a duty to obey lawful orders. The firearms regulations were lawful according to GDR law. As discussed, the definition of *who* constituted a criminal and *what* constituted a crime (trespassing) was at odds with the principle of proportionality, with the person’s right to life and with the right to free movement and travel, as well as being independent of the actual justice and principles of humanity. Consequently, the use of lethal force and the firearms regulations constituted a firm authorisation to fire at individuals crossing the border from East to West. Shooters could thus rely on the official authorisation and legalisation when deciding whether to shoot.

Furthermore, because the actual wording of the law was ambiguous and regularly changed between *being allowed to shoot* and *having to shoot*, many officers and soldiers were thus not aware of the actual law and, indeed, testified to the fact that it was contradictory (Rosenberg, 1996, p. 286; Sälter, 2009, p. 171). For superior officers, irrespective of whether or not they agreed with the (interpretation of the) firearms regulation, the situation was arguably more problematic, as they were responsible for the actions of their subordinates. Sälter also stated that many of the officers were not entirely clear about what the firearms regulations entailed on paper, but because they would be held accountable for every crossing and there was an almost entire lack of legal investigation into shooting incidents at the border, along with considerable rewards for halting and shooting refugees, superiors were thus encouraged to make their subordinates shoot (Sälter, 2009, pp. 199-200).

A successful border crossing at a soldier’s post would certainly have prevented the future career advancement of the superior (Rosenberg, 1996, p. 286). Former political officer Huber confirmed in an interview that there should have been a military investigation for every shooting at the border, but that this never happened, thereby further legitimising the legality

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<sup>322</sup> This is also reflected in the representation of the successor parties in the German Parliament to this day.

of the use of lethal force, irrespective of its actual legality (Rosenberg, 1996, p. 287). By contrast, every successful crossing was investigated with the individuals involved being subjected to harsh interrogation, and often threatened with a criminal investigation, in addition to suffering the social punishment of having failed to “do their job”. Those negative consequences for all involved aimed at ensuring that everyone did their utmost to prevent escapes (Sälter, 2009, p. 200). This explains why superiors often covered for their subordinates in cases in which unnecessary shots were fired (Sälter, 2009, p. 200).

Guards who prevented escapes were rewarded and remunerated with cash bonuses, extra leave days, as well as occasionally receiving decorations, gifts (golden watches), commendations and promotions (Rosenberg, 1996, p. 287; Sauer & Plumeyer, 1991, p. 68).<sup>323</sup> The combination of the ostentatious decoration of shooters and preventers and the absence of any proper investigation of cases in which escapees were shot, sent a strong message that using lethal force to stop border crossers was not only authorised, but demanded.

### **6.2.2. Recruitment, indoctrination, and training**

„Lieber zehn tot vor der Mauer als ein Toter hinter der Mauer”<sup>324</sup>

The border troops constituted a special force that reported to various and changing authorities. Already during the early police force years up until 1955, border guards increasingly clandestinely fulfilled military functions: the guards received military training, lived in barracks, were subject to military law and officially protected the state from external threats (Grandhagen, 2004, p. 16). This section looks at how the SED attempted to make border guards as obedient and conformist as possible by shedding light on how recruitment, general training and indoctrination from the military institution were adjusted to suit the SED’s needs.

As discussed in Chapter Three, military training aims to automatise the behaviour of soldiers: to make them execute their orders without consideration and to automatise routines to the extent that soldiers do not have to think about what to do, but rather carry out well-rehearsed commands. Basic military training in general includes two major aspects: (1) weapons training and drills, and (2) instilling of the military ethos, including obedience to superiors, strong group spirit and loyalty (Holmes, 1985; Ricks, 2007). One additional extremely relevant part of the NVA training was political education (i.e. indoctrination), especially for those who were guarding the border. The enemy, it was taught, included anyone who criticised or did not agree with the socialist party (Rosenberg, 1996).

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<sup>323</sup> In particular, the *advanced post* would receive 75 GDR marks, the post 50 marks for halting, while if the weapon was used, an additional 25 marks were granted.

<sup>324</sup> Quote by a NVA deserter about what he learned in political education (Sauer & Plumeyer, 1991, p. 163).



Generally, ordinary military training needs to ensure that group cohesion exists, for the simple reason that members of a unit need to be able to wholly rely on each other and must be willing to risk their lives for each other in battlespace. The creation of a *band of brothers* leads to horizontal control and limits individualistic behaviour: to function well, the unit needs to be more important than the individual. Nevertheless, this aspect was different in the NVA, in that soldiers were trained to be suspicious of their comrades and instructed to spy on them. Especially among border guards, loyalty to the state was more important for the NVA than the bond among soldiers: they solely had to secure the permeability of the border as opposed to sticking together when attacked. Moreover, “enemies”, “traitors” or “criminals”, i.e. any person who wished to leave the country, could very well be found among one’s group.

The conscription of all young men in 1962 created a pool for recruiting the thousands of guards necessary to protect the border. The party leadership specifically aimed to recruit *suitable* candidates, by pre-selecting young men who ideally had no family in West Germany and were “politically reliable”, which is to say that they were not openly opposed to socialism. Those young men without relatives in the West were considered more suitable for duty at the border, because it was assumed that those who had relatives in the West were a greater risk in terms of escaping themselves (Schultke, 2008, p. 100). The second distinction to determine one’s “suitability” pertained to the young men’s political “reliability”, for which local Stasi records were consulted (ibid.).<sup>325</sup> Huber, the above cited former political officer, stated in an interview that in order to create collective thinking, the guards were sealed off from the rest of society into a bubble, allowed no West German television and had very limited contact with society (Rosenberg, 1996, pp. 280-281). Despite their efforts, not all recruited border guards measured up to these requirements due to the fact that the amount of guards needed was simply too high to find sufficiently *suitable* young men (Sälter, 2009, p. 125).

After 1962, border guards were trained as soldiers<sup>326</sup> in a special unit of the military at a different location.<sup>327</sup> A crucial part of their training, aside from the three-to-six months of basic training (shortened only in 1987) was political formation, which consisted of around five-to-seven hours per week of political education. In this political education, which might be better described as indoctrination, the threat from the West was emphasised and a “Haß-Bild” was created: hate was instilled towards everyone who opposed the socialist system, including those “criminals” who “betray” the state and all its citizens by preferring to live in

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<sup>325</sup> That said, most young men already knew not to share any opposition to the regime, as those who had openly criticised the SED had already experienced the social consequences of doing so. Therefore, Schultke notes, the political classification was flawed.

<sup>326</sup> Even when border security was still in the hands of the police, the training of the guards did not differ much from the later training. The troops were already included as “barracked police” forces and constituted a paramilitary group that would have supported the army in the case of war. The training included basic military training, weapons training and tactics trainings specific to the border guards, such as, for example, how to arrest escapees (Sälter, 2009, p. 156).

<sup>327</sup> Yet, many of the guards were offended, and emphasised that the troops were not part of the NVA, even though after 1962, the border regime was accountable to the Ministry of Defence, and many of them were conscripts.

the “evil” capitalist society (Sälter, 2009, p. 161; Schultke, 2008, p. 105). For example, when former border guard Rolf Dieter H. was questioned as part of the Mauerschützen trials, he claimed that he truly believed he was doing the right thing when he shot an escapee multiple times after he had already been arrested by two other guards (Sälter, 2009, p. 209). While shooting, H. called out: “I swore to myself that no one would make it out alive” and stated that he truly believed every border crosser was a criminal whose life did not have to be spared (ibid.).<sup>328</sup> Despite their efforts to politically indoctrinate its soldiers, the NVA’s “socialist class awareness” was not entirely successful, as the high number of deserters and defectors from the NVA indicates (Schultke, 2008, p. 68).<sup>329</sup> During duty, superiors were also instructed not to place close or good friends on common duty, because it was believed that this may also increase the risk for a *common* escape (Schultke, 2008, p. 121).

The indoctrination program emphasised that the enemy was to be expected everywhere, Huber said, while Berlin was often referred to as a “combat zone” and it was explained to soldiers that “East Germans who were trying to flee, were either armed criminals or dangerous lunatics” (Rosenberg, 1996, p. 284). If the border crosser was a family member, they were also to be considered as traitors. Every border guard was familiar with and warned about cases like the NVA deserter, Werner Weinhold, who shot two border guards during his escape in 1975.<sup>330</sup> Not only did the wide dissemination of this story stress that guards could not trust each other, it also framed anyone who was attempting to escape as a threat, as likely to be armed and willing to kill for the sake of his or her escape.

### 6.2.3. Fear of punishment

Obedience and the criminalisation of disobedience constitute a primary pillar of the military institution, as was detailed in Chapters One and Three. Border guards had to obey their orders just as all soldiers and security agents of states are bound by their duty to obey. In the GDR, as discussed above, the respective duty to obey orders was incorporated in the Criminal Additions of Basic Law of 1957 before being replaced by the Criminal Code of 1968.<sup>331</sup> In

<sup>328</sup> See Judgment of the LG Berlin, 12.9. 1995, yet, it cannot be known to what extent his claims that the GDR indoctrination was internalised by him were merely a defence in court. Having said this, he did become a full-time Stasi spy following his three years with the border guards.

<sup>329</sup> The Ministry of State Security investigated the high rate of deserters in 1961 (seventy guards had escaped during the 4 months after the wall was erected) and concluded that “Insufficient influence of Party and Free German Youth on border guards” was to be blamed (Rosenberg, 1996, p. 283).

<sup>330</sup> The fact that he already had a criminal record prior to joining the NVA and was left by his wife was left out of the story, as well as the fact he was later sentenced to 1,5 years imprisonment by the West German judicial system (Albert & Salier, 2009, p. 349).

<sup>331</sup> Gesetz zur Ergänzung des Strafgesetzbuches - Strafrechtsergänzungsgesetz (1. Dezember 1957), Article 35. Befehlsverweigerung. (1) Wer einen von einem Vorgesetzten erteilten Befehl nicht ausführt oder die Ausführung des Befehls verweigert und dadurch einen erheblichen Nachteil für die Disziplin, Ausbildung oder Einsatzfähigkeit der Einheit herbeiführt, wird mit Gefängnis bestraft. Wer einen Befehl nicht befolgt, dessen Ausführung gegen die Strafgesetze oder gegen das Völkerrecht verstoßen oder die im Arbeiter-und-Bauern-Staat geltende Achtung des Menschen verletzen würde, bleibt straffrei. (2) In schweren Fällen, insbesondere wenn das Verbrechen von mehreren Personen gemeinsam oder in einer Zeit erhöhter Gefährdung der Deutschen Demokratischen Republik begangen wird, ist auf Zuchthaus zu erkennen., And see Strafgesetzbuch der Deutschen Demokratischen Republik (StGB) dated 12. Januar 1968 reads: Article 257. Befehlsverweigerung und Nichtausführung eines Befehls. (1) Wer die

addition to the authorisation to use lethal force, the fear of punishment for disobedience was also likely to influence guards to obey or, at least, not to express opposition to having to use lethal force. In order to deter guards from refusing to shoot, a few *show trials* were conducted to demonstrate the authority's willingness to take legal action. By contrast, if too many cases of disobedience were to be made public, it would have damaged the image the SED wanted to maintain, namely, that people believed in and adhered to the system.

One exemplary prosecution was that of the cadet, Wolfgang Seiler, who expressed doubts regarding the building of the Wall in 1961 and was subsequently prosecuted for agitation (Diedrich, 2005, pp. 139-140). Yet, the legal consequences for disobedience and nonconformity were less likely to occur than disciplinary punishments: the party-leadership did not desire attention for disobedience in cases of the use of lethal force, and instead superiors were able to discipline their subordinates for disobedience immediately, by for example, ordering them to be placed under house arrest (Sälter, 2009, p. 202). Accordingly, in 1961, a border guard received a two-and-a-half-year prison term for *not* shooting (Rosenberg, 1996, p. 287). Superiors could also threaten their subordinates with being sent to the dreaded military prison Schwedt, and, indeed, were permitted to sentence their soldiers to three months there without trial (Rosenberg, 1996, p. 288).

The fear of legal punishment was possibly equal to the fear of social punishment and the ways in which the Stasi could have responded to dissident behaviour. The so called *Hauptverwaltung I* of the Stasi was in charge of the NVA, including border troops. A link between the Stasi and the military was the *Administration 2000*, which included unofficial and official spies within the armed forces. The *Hauptverwaltung I* was already involved in the recruitment process via compiling a political report about each candidate (Grandhagen, 2004, p. 273). One spy was responsible for reporting on around 10 comrades (Schultke, 2008, p. 122). No one knew who was spying on who and who they could trust.

Cases such as Rolf Dieter H's shooting of an already captured person, as well as other cases from the border guards' trials show that the use of lethal force was not an exception (Sälter, 2009, p. 209). Border guards received their orders in a conducive context which made obedience and conformity more likely to occur. In addition to the (legal) justification for the lethal use of force and the environmental influences that aimed to increase the obedience of border guards, for young men themselves, it was possible to rely on their individual "moral disengagement mechanisms" (as discussed in Chapter Three). The first factor that contributes to individuals obeying orders (they may realise to be unjust or illegal) is that an authority demands an action to be carried out. As discussed above, in East Germany the authorities even legalised shooting, which led to the acceptance of one's role at the individual level. Guards could perceive themselves as mere instruments of the state, *simply doing their job*.

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Ausführung des Befehls eines Vorgesetzten verweigert, wird mit Freiheitsstrafe bis zu fünf Jahren oder mit Verurteilung auf Bewährung oder mit Strafarrest bestraft. (2) Ebenso wird bestraft, wer den Befehl eines Vorgesetzten nicht, unrichtig oder nicht vollständig ausführt. (3) Wer die Tat im Verteidigungszustand begeht, wird mit Freiheitsstrafe nicht unter einem Jahr bestraft.

Many guards did not feel it was their place to judge what was right or wrong; simply put, it was the law and it had to be carried out without question. Their behaviour was officially authorised, socially expected, while indoctrination helped to further justify their obedience and conformity.

A second factor making the (justification of the) shooting “easier” concerned the process of *blaming the victims*. Guards could tell themselves that those individuals, even if they were not criminals, still knew what they were getting themselves into: “it was illegal and dangerous to attempt to cross the border”, “he knew what to expect”, as one former guard stated (Rosenberg, 1996, p. 273). In such cases, the SED’s indoctrination appears to have been successful: the rhetoric and the negative consequences for non-compliance in some cases led to internalisation: some guards, like Rolf-Dieter H., may have actually believed that shooting the escapees was the “right” course of action, that those individuals were criminals and had to be halted via the use of lethal force.

Such conformity was long-lasting in some cases; indeed, some guards who wholly internalised their actions still argue that what they did was perfectly just and that they stand behind their conduct (Baumgarten & Freitag, 2005). Conscientious border guards, who wanted to disobey their orders to shoot people, had to fear three forms of punishment, legal punishment, immediate disciplinary measures, and social punishment that were carried out by the Stasi. Yet, as will be described below, there were former guards who against all odds believed in their duty to disobey orders and acted conscientiously.

### **6.3. Forms of conscientious disobedience at the Wall**

The present section situates different forms of behaviour by former guards in the *taxonomy of conscientious disobedience* delineated in Chapter Four. These real-life examples of border guards’ responses to the firing order illustrate, not only that a range of behaviours was recorded, but also that distinguishing between behaviours is a useful first step in understanding soldiers who want to disobey orders for conscientious reasons.

The taxonomy presupposes that conscientious disobedience follows an illegal order. As the firing order itself was arguably not always *manifestly* illegal, some judges based the duty to disobey orders on the perception or awareness of the wrongfulness of the order of the guard. The first relevant investigation revolves around former guards’ identification of the wrongfulness of the order, which will be addressed in section 6.3.1. Former guards were questioned regarding their thoughts about the firing order via an online questionnaire.

Section 6.3.2 then proceeds to discuss illustrative cases of former guards who viewed their orders as wrongful and acted (or wanted to act) on their conscience, which are classified as *stage 1 responses* and entail two forms of disobedience: direct and indirect disobedience or evasion. Direct disobedience includes confronting one’s superior and expressing one’s

unwillingness to execute the order. As in every military unit, obedience to obeying orders is an intrinsic part of the institution itself; therefore, open disobedience is rarely “simply” accepted by superiors without any consequences. In the present approach, a general expression of a former guard’s unwillingness to carry out the firearms regulation is included under the discussion of direct disobedience, irrespective of where the refuser and the superior were (location) and whether the refuser was in an imminent situation in which the attempt to cross the border took place.

Refusals also include the expression to carry out the firearms regulation in a hypothetical situation along with refusals of the immediate instruction, because in the hypothetical case, the former guards in question were willing to accept the consequences of their disobedience. Expressing an unwillingness to carry out orders can bring about public confrontation, whereby the guards could have suffered immediate negative consequences as opposed to evasion, where disobedience occurs in the form of secret behaviour, and remains that way unless one gets caught.

Section 6.3.3 discusses cases of indirect disobedience, which took many forms in East Germany. Evasion can be immediate or somewhat delayed, and, most importantly, as opposed to direct conscientious disobedience, can go unnoticed and without having to face consequences, not to mention that if one gets caught, evasive behaviour can be plausibly denied.

### **6.3.1. Perception of the wrongfulness of the order**

In 2011, 157 former border guards filled out an online questionnaire about their past experiences as border guards. In the questionnaire, they were asked about their past, as well as, present views with regards to the firing order. The respondents were all members of an online forum called “Forum der Grenze”. All *users* of the forum (roughly 1,100 individuals were registered as users) were invited to fill out the questionnaire, which covered data ranging from personal information to what respondents thought about the firearms regulation and to personal experiences with the firearms regulations.<sup>332</sup>

The majority (61 %) of the respondents were born between 1960 and 1970 (they consequently served roughly between 1980 and 1990), followed by the second group of guards, 26 %, who were born between 1950 and 1960 (served between 1970 and 1980), 10 % were born between 1940 and 1950 (served between 1960 and 1970) and 3 % were born before 1940 (and served before 1960) or after 1970. This distribution is not unsurprising, as these guards were contacted via the internet and thus were, as users of the internet, a relatively young generation of border guards.

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<sup>332</sup> See Appendix 1 for the full the questionnaire.

The former guards were asked about their personal perception of the firearms regulation and could choose to either tick a box with a pre-formulated answer or write out their own answer in an open-ended section. In response to the question: “What did you think about the firearms regulations during your time of service?”, the following answers were provided:

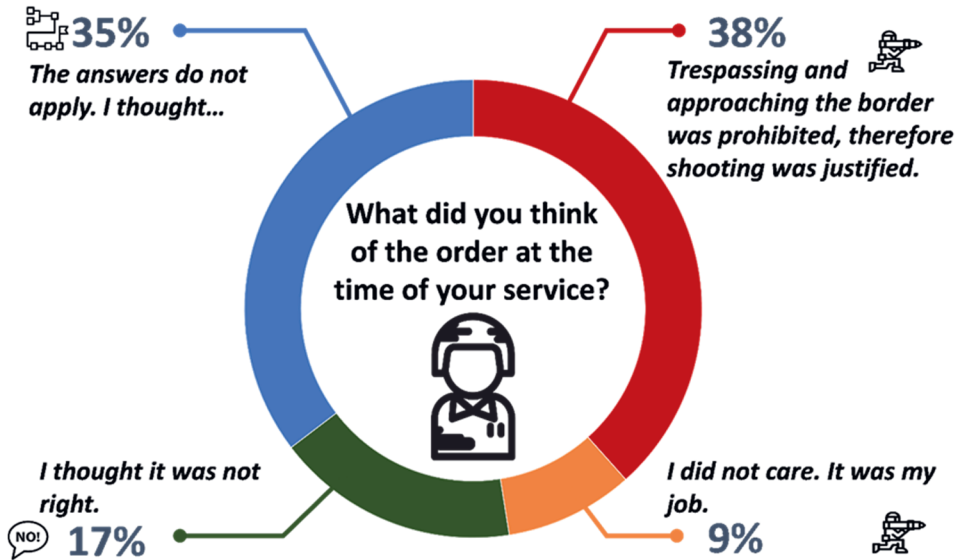


Figure 16 Perception of the wrongfulness of the firing order (GDR)

Figure 16 shows that while 38 % of the respondents perceived their orders as justified, 17 % of the respondents thought the order was wrongful. The 35% of respondents who chose not to tick any of the pre-formulated answers generally provided a more nuanced answer to the question. Respondent 303, for example, stated: “It was a restricted military zone. Whoever enters the zone, knows the dangers they could face. But a state that incarcerates its population is sick” (Questionnaire responses, p. 5/109). Respondent 247 wrote: “I probably would have acted according to the law, but I was well-aware of the controversy over the order” (Questionnaire responses, p.4/109). Others gave very vague answers or answered that they did not remember what they thought about the order back then.

Identifying that an order is wrongful is the first step in acting upon one's conscience and realising that one has a (moral) duty to disobey. While knowing something is wrongful and acting upon this knowledge by disobeying superior orders cannot be equated, many former guards stated in various open-ended questions that they hoped that they would never get into a situation in which they would have to shoot, thus showing that they were aware of the controversy over the order, but perhaps were not necessarily willing to face the consequences of disobedience.

At the same time, a considerable number of respondents also felt that the shooting was lawful and therefore justified. As discussed earlier, a question inquiring about someone's opinion from at least two decades ago, may not exactly represent the views of the respondents at that time. Yet, if asked about their respective opinion back then, there also would have been no certainty that the answer given was, in fact, the respondent's true opinion either, or the opinion the respondent thought they should give. The fact that a variety of answers were given testifies to the fact that not all guards perceived the order as being wrongful, even if some of them may have changed (sub)consciously whether they thought the shooting was justified or not.

### **6.3.2. Direct disobedience**

On the 24<sup>th</sup> of May 1964, an anonymous second lieutenant directly refused a literal order to shoot a number of escapees he and his captain had discovered (Sälter, 2009, p. 201).<sup>333</sup> A report of such a clear case of directly refusing to fire upon people is rare, as the superior whose shooting orders were refused would be investigated, and as mentioned above, not promoted. As the protection of the Berlin Wall and border and the means to do so were legal according to East German law, military courts could prosecute border guards who refused to shoot fleeing individuals, as they were directly refusing to obey an order. While the second lieutenant faced judicial consequences and incarceration for his disobedience, as aforesaid, most other reluctant guards were merely disciplined for refusing to shoot. The legal consequences of disobeying an order to shoot are thus likely to have only served as an exemplary deterrence to discourage other guards from refusing, as the regime was well aware of the controversy over the order (Sälter, 2009).

A further exemption to the preference of disciplining guards for disobedience rather than court-martialling them, was the case of Wilfred S. Wilfred was drafted into the East German border guard in 1971. During his duty, he expressed his (hypothetical) unwillingness to use his firearms in July 1972 (Military Archives, DVW9/27642). He first uttered his reluctance to his comrades, upon which he was summoned to his immediate superior, to whom he repeated his conscientious disobedience as follows: "No, I will not do that, I cannot reconcile

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<sup>333</sup> The captain who subsequently shot and injured one escapee suspended the second lieutenant, removed his weapon and his pay book. The refuser was suspended, and after 4 days of investigations and interrogations by the Stasi, he was prosecuted by the military court in Berlin and sentenced to 10 years in the military penitentiary at Bautzen (Sälter, 2009, p. 202).

it with my conscience. I will not shoot.” (Military Archives, DVW9/27642).<sup>334</sup> Such a direct and public expression to refuse to carry out the standing order is crucial, even if the situation had not arisen (yet), because the border guard in question pre-empted having to refuse the order in the heat of the moment, but was willing to face the consequences of refusing an order for conscientious reasons. Wilfred S. received a three-months sentence for his conscientious disobedience (Wenzke, 2006, p. 344).

While the first example of the second lieutenant illustrates a direct public refusal, the second example illustrates the (probably) more common form of refusal, in which no concrete order to shoot escapees is given, but the subordinate expresses his general unwillingness to shoot in the event of such a situation. The respondents were also asked if they themselves had experienced or knew of any guards who refused to shoot. More specifically, respondents were asked (1) if they personally knew of anyone who had expressed that they (would) refuse to shoot; (2) if they had heard of a story about a refusal to shoot; and (3) if they themselves refused to act in accordance with the firearms regulation.<sup>335</sup> As illustrated in Figure 7, in addition to the second lieutenant and Wilfred S., five respondents from the questionnaire described how they themselves expressed an unwillingness to carry out the firearms regulation.

**Respondent 190** remembered being asked a hypothetical question by his staff sergeant when he was training to become the post leader or “Postenführer” in September 1989, just a couple of months before the borders were opened. He was asked: “comrade recruit, imagine: you are on duty at your post at the border and about 400 people, women, children and men, as is currently happening in Hungary, walk towards you, what would you do?”. R 190 answered that he would “step aside not to be run over by the crowd”. The major reminded R 190 that he would have to use his firearms to which the former guard described responding that he would not do so (Questionnaire responses, p. 50/105). R 190 himself then pointed out that he did not regard his behaviour as direct disobedience, as the major had only asked a hypothetical question. For the purposes of this study, the behaviour of R 190 is crucial, because he expressed his unpreparedness to use his firearms to protect the border. In so doing, he announced his hypothetical refusal to his superior, and was thus prepared to accept the consequences of his disobedience.

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<sup>334</sup> He was sentenced to three months incarceration on July 14<sup>th</sup>, 1976 for refusing to obey an order (Article 257, Strafgesetzbuch). The court file described that “the beliefs of the defendant are based on politico-ideological obscurities”, but since he otherwise showed insight into the consequences of his refusal and stated in court that he was going to fulfil all his duties in the future (when conscripts were prosecuted, the time of detention was later added to their 18 months of conscription).

<sup>335</sup> See Appendix 1 for the full questionnaire. The German phrasing was: “Hat jemals einer Ihrer Kameraden sich ausdrücklich geweigert auf unbewaffnete Zivilisten zu schießen? (1) Nein, keiner meiner Kameraden hat das ausdrücklich verweigert (82 %), (2) Ja. Ich habe miterlebt, dass einer (oder mehr) Kammerad(en) sich ausdrücklich geweigert hat (haben)... (4 %), (3) Ja. Ich habe gehört, dass einer (oder mehr) Kammeraden sich ausdrücklich geweigert hat (haben)... (13 %). In a subsequent question, the respondents were also asked if they themselves refused to carry out the order (Haben Sie jemals den Befehl auf unbewaffnete Zivilisten zu schießen ausdrücklich verweigert? Nein (97 %). Ja (3 %).



**Respondent 322** wrote that when he was drafted in 1987, he raised concerns about having to use firearms against people during his medical examination, and reported that when his medical “evaluator” responded “you would have to do this during war as well”, R 322 replied that “in war, it is a question of survival, “who is shooting first?” (Questionnaire responses, p. 50/109). R 322’s expression of unwillingness could also be classified as “selective conscientious objection”, but in the context of the GDR, directly informing the authorities of one’s unwillingness to carry out orders could lead to immediate adverse consequences and is therefore considered as an act of disobedience. The respondent became a construction soldier, but it is unknown whether his hypothetical questioning led to this specific placement (Questionnaire responses, p.7/109).

**Respondent 496** described how, in a questionnaire he had received from the Ministry of State Security, “*I openly ticked the boxes never wanting to shoot an unarmed person, family and friends, or comrades*” (Questionnaire responses, p. 50/190). He continued: “my comrades and I decided that after a trespasser would have successfully crossed the border, we would have fired our guns into the direction of the Wall so that we would not get into trouble ourselves” (Questionnaire responses, p. 60/109).<sup>336</sup> Due to the fact that he publicly announced his unwillingness to carry out the order, his response could have led to adverse consequences, and, hence, can be classified as a form of direct conscientious disobedience, rather than evasion.

**Respondent 522** stated that: “In 1988, I expressed to my superiors in writing that I did not want to shoot people during peace time” (Questionnaire responses, p.17/109) and was relocated to report to office duty afterwards (Questionnaire responses, p. 18/109).<sup>337</sup>

**Respondent 542** answered to the question: when and how would it have been possible to refuse to carry out the order?: “I myself told my superiors that I was unwilling to shoot obvious relatives and friends” (Questionnaire responses, p. 33/109).

As discussed above, ordinarily conscripts who expressed either doubts about the order or reservations about having to shoot their own people should, in principle, not have become border guards, as they would have been considered “unsuitable recruits”. Therefore, the fact that five former border guards openly expressed their refusal, but nevertheless were still accepted to join or remain is not insignificant. It suggests that the Stasi’s pre-selection of

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<sup>336</sup> Surprisingly, he went further and stated that his openness did not have consequences and suggested that his superiors had a similar mindset, and that they possibly regretted serving at the border. Most of them wanted to study. R 496 did write that he was often removed from the regular post duty and no longer directly served at the border. This transferral, R 496 hypothesised, may have also been due to the successful escape of a relative of his (Questionnaire responses, p. 50). At the same time, R 494’s information does show that depending on the commander, there was more room for interpretation and application of the order than is often assumed. (and that the commander himself did not want to get into trouble, as discussed above).

<sup>337</sup> He stated that, as a result, his vacation and leisure leave (Ausgangssperre) were halted and after one day serving at the back-end of the wall (Hinterlandsmauer) was only assigned to *Innendienst* from there on and never again served at the border. He said he was happy with the outcome, but believed the mild response was a consequence of the regime nearing its end (ibid.).

soldiers and the military training and indoctrination was not always successful, as well as the fact that not every “dissident” suffered harsh consequences.

Direct conscientious disobedience, as presented in the first case, was less common than the expression of the refusal to shoot for obvious reasons: there were few situations in which an imminent refusal was possible, as the escapees would have had to be seen, the direct order would have had to be issued, and the event would have had to have been reported by either a superior or subordinate. Examples of cases in which border guards expressed their unwillingness to shoot testify to the presence of conscientious disobedience, even if they were never actualised, albeit it is unknown whether refusers (or supposed refusers) would have actually refused in the real situation. Despite this, the fact that they expressed their disobedience (for which some have been legally prosecuted) is a noteworthy finding in the study of conscientious disobedience.

### 6.3.3. Indirect disobedience

The second form of conscientious disobedience included in the taxonomy is indirect disobedience. As discussed in Chapter Four, indirect or evasive disobedience differs from direct conscientious disobedience by virtue of the fact that the order in question is not carried out secretly, without directly confronting a superior. If caught, the soldier who did not obey orders can be charged with disobedience. Yet, if an evading soldier remains uncaught, he or she might not suffer any consequences for their disobedience. Accordingly, if unnoticed, this form of conscientious disobedience can remain secret behaviour, which is difficult to accurately study because evasion as a form of conscientious disobedience may not leave any trace or evidence. At the same time, because direct conscientious disobedience brings about negative consequences for the member of the military, evasive behaviour remains a vital option for soldiers who do not want to carry out orders they deem to be illegal or wrongful.

For example, *Die Zeit* published an article in 1965 entitled “Verurteilt wegen Menschlichkeit”, which describes a situation in which a border guard was prosecuted for shooting 60 rounds at an escapee, but failed to prevent the escape.<sup>338</sup> The guard’s missing of the target was regarded as intentional and therefore treated as a form of disobedience by the authorities. His trial, in all likelihood, constituted an exemplary trial (or “scare trial”), via which the East German politburo attempted to pressure more guards into obedience by prosecuting the act of *not shooting and missing the target*.

In East Germany, many of the hundreds of thousands of guards who served during the 40 years were never actually in a position where they could refuse to carry out an order or evade,

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<sup>338</sup> See *Die Zeit* 1965, see reference list, internet sources. Unfortunately, the according file could not be located at the Federal Military Archives, since all files dating back to before 1976 had been destroyed.

simply because they never witnessed an escape attempt in the first place.<sup>339</sup> Considering what they think they *would* have done upon being confronted with an escape attempt might shed more light on the existence and/or desire to engage in evasive behaviour as a form of conscientious disobedience.

For example, the majority of the former border guards who answered the questionnaire never witnessed an escape attempt and thus had never been in a situation where they could (directly or indirectly) refuse to shoot.<sup>340</sup> Of the roughly one third of respondents who witnessed an escape attempt, nearly 80 % stated no fire power was used. As per decree, guards were supposed to halt people by yelling “Halt, Polizei, Stehen bleiben”. If the instructions to halt were ignored, guards usually fired warning shots, which is what few respondents confirmed. Some respondents reported to have fired onto the escapees, a handful of guards stated they injured escapees, and in one case the respondent stated the refugees were killed as a result of the gunfire used by themselves and their comrades. The remaining two thirds of respondents who did not witness an escape attempt were asked what they think they would have done. The answers to the hypothetical question provide insight into what the former guards believe should be done and what they believe they would have done.

**Respondent 90/ Richard H.** described in his memoirs how he and his comrades decided together that “We will not shoot anyone”, who also described this common or group refusal in his memoirs about his experience as a border guard (Hebstreit, 2007, p. 9). R 90 also believed that the appropriate reaction to seeing a person attempting to cross the border would have been to shoot in the air and miss the target safely (Questionnaire responses, p. 47/109).

**Respondent 354/ Jörg R.** also reported that he believed he would have attempted to arrest an escapee without the use of firearms, and if he would have been directly ordered by a superior to shoot an escapee he would have tried to shoot and miss the person (Questionnaire responses, p. 48/109).

**Respondent 394/ Herbert X.**<sup>341</sup> stated that if he were to witness a border crosser, he would have fired a warning shot, or depending on the situation, he would not have reacted at all. He literally wrote that he would have never targeted a person (Questionnaire responses, p. 48/109). This view was shared by 42 respondents (27 % of all respondents), who stated in some form that they would not have used firearms, fired warning shots, missed the target and only have shot if their own life was at risk, see Appendix 4 for the respective open-ended answers. While such an answer may appear to be socially desirable, a considerable number of respondents still stand behind the GDR laws and the use of firearms.

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<sup>339</sup> Of the sample of respondents, 68 % never witnessed an escape attempt. Of the 32 % who witnessed an attempt, 67 % stated that the attempt they witnessed was unsuccessful and 33 % witnessed a successful attempt (possibility for evasive conscientious disobedience).

<sup>340</sup> When asked whether they had witnessed an attempt to cross the border, 32 % answered the question affirmatively. Of these, 67% witnessed an unsuccessful attempt, while 33% of the witnessed attempts were successful (Questionnaire responses, p. 5/25)

<sup>341</sup> Herbert wished for his last name to remain anonymous.

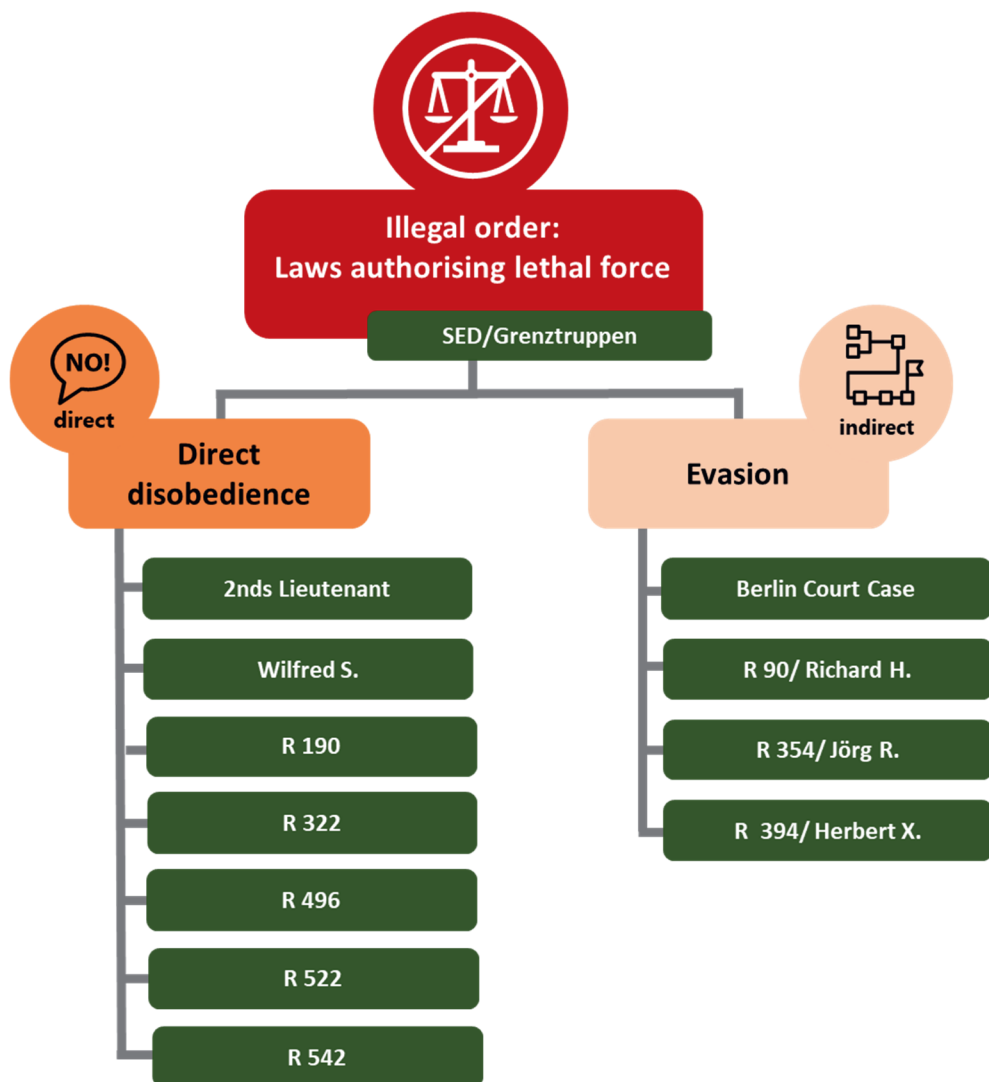


Figure 17 Examples of conscientious disobedience in East Germany

In conclusion, the questionnaire responses indicate that numerous guards stated they were indeed opposed to the application of the firearms regulation, which necessitated firing at civilians who were merely attempting to leave the state. On the other hand, some also expressed their own unwillingness to shoot transgressors or refugees. From the questionnaire and other secondary sources, it is evident that opinions on the firing order were diverse. A central feature in this study of conscientious disobedience was that many former guards reported that they believed that evasion was the appropriate reaction, despite the Stasi's presence and the possible sanctions that some border guards would have had to endure if caught, such as the one guard who was sentenced for deliberately missing with his shots. It

is also interesting to note that there are obvious discrepancies between how border guards look back on this period, as some say they would have evaded, some say that back then they thought the firing order was justified, while a third group vehemently refused to acknowledge that there was a firing order, or even that what happened was wrong.

#### **6.4. Factors contributing to conscientious disobedience**

For the purpose of better understanding why some former border guards identified the order as wrongful and why they did not want to shoot, the present section examines the factors that are normally expected to contribute to increased obedience and conformity in those cases in which former guards were opposed to using lethal force. In order to do so, environmental factors that impact on the decision to disobey (or wanting to disobey) in the macro dimension, social forces in the meso dimension, as well as possible personal factors in the micro dimension contributing to the decision of the soldier not to carry out the order are examined below.

As discussed above, the decision to (publicly) stand up to the system in any form not only requires the individual in question to realise that what they were asked to do was wrongful, but also that they are willing to deal with the possible consequences of their conduct (if caught). Indeed, the impact on the rest of the family could be significant, as the soldier's whole family would have to suffer the political consequences of their conscientious action; for example, the Stasi would not only harass the spouse but even the parents of the "offender" (Koop, 1996b; Rosenberg, 1996).

Whilst this study generally does not focus on *stage 2* responses, a statement by deserter Werner M. appears to have had an impact on his decision: "I am single, so I would have not minded so much [if his attempt to desert failed and he would have been imprisoned as a result]. I could imagine that this decision [i.e. the decision to desert] was more difficult to make for married comrades, and they would have burdened their conscience so they would not be separated from their families. To me, the firing order was inhumane, which most of the others also thought, but on the other hand, most people think of the consequences following their own disobedience" (Sauer & Plumeyer, 1991, p. 65). Such decision-making may be found in other forms of conscientious disobedience as well. The same reasoning might also apply to evaders and direct refusers: a young single man is in a different position than a father, who (in part) provides for his family and has to consider his family's well-being.<sup>342</sup>

Every situation in which an individual soldier decides to refuse orders based on her or his conscience is idiosyncratic, whether in terms of expressing the unwillingness to carry out the order, by not shooting after having been instructed to, or by merely forming the decision not

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<sup>342</sup> In many cases, the parents of a deserter or refuser would have been harassed by the Stasi. Yet, this fact might be on the conscientious soldiers' mind less than his wife and children.

to shoot should the situation arise. In a similar vein to the examination of disobedient soldiers in My Lai, three case studies will be examined below in order to provide more background knowledge of why and how border guards came to take the position that they would disobey. In the case of My Lai, the three discussed individuals stated that they would not carry out an explicit illegal order, while in East Germany, three individual former guards did not want to carry out the standing illegal, yet, according to GDR law, lawful, order. One could argue that the illegality of the My Lai order should have been more “apparent” to the soldiers, although, as discussed, this may not be the case. In all these examples, the present analysis seeks to explore why some soldiers identified the orders to be wrongful, despite the influence of environmental and social forces.

To better understand and tentatively explain why some guards did not want to carry out their orders, follow-up online communications with the respondents are considered. The contacted subjects were not only aware of the wrongfulness of their orders, but in some form expressed their unwillingness to obey the order to shoot. Richard H. (R 90) published his experiences in 2009, then, a personal communication with Richard led to the finding of the Forum der Grenze -website and the subsequent development of the questionnaire which was posted on the website. Jörg R. (R 354) and Herbert X. (R 394) filled out the questionnaire in 2011 and later agreed to be re-approached for follow-up questions in 2017. The subsequent section first offers some background and contextual information about the three former guards. Then, as discussed above and in previous chapters, macro, meso, and micro factors are considered apropos each of the respective unwilling border guard: the failure to feel authorised, the failure of pre-selection and indoctrination, the failure to de-humanise the victim (not seeing the border crosser as an enemy) and finally the individuals’ own explanation for their unwillingness to shoot.

#### **6.4.1. Introducing micro factors: Richard H, Jörg R., and Herbert X.**

The first former guard to be discussed is Richard H. (R 90), who worked as lathe operator before he was drafted into the border guards, where he served between 1966-1967. In 2009, he published a book titled *Grenzsoldat* about his experience as a former guard, in which he depicted not only his day-to-day activities, but also how he was surprised to be drafted into the border guards in the first place, given that he had family in the West and had been arrested in the summer of 1962 for a supposed escape attempt when he was 16 years old (Hebstreit, 2007, pp. 11-12).

He did not believe in the ideology of the system, due to the influence of his family and work colleagues and how he himself experienced the regime (Hebstreit, 2007, p. 59). Richard made (however serious) plans to desert from the NVA with his comrades (Hebstreit, 2007, pp.19/20). When a comrade made it across to the West, he stated: “I was happy that Kurt made it. I was disappointed that I was not on the shift with him that night so that I could have escaped with him” (Hebstreit, 2007, p. 21). He recalled how he and his comrades had

discussed the topic of having to shoot a civilian at great length and that they had all decided that “We will shoot no one” (Hebstreit, 2007, p. 9). This agreement among the former guards constitutes a form of (hypothetical) conscientious disobedience.

The second individual studied here is Jörg G. (R 354), who was drafted into the border guards out of high school in 1983. Now working as a high school teacher, he stated that “because I wanted to study education, I agreed to serve for 3 years (instead of 18 months) and thus became a non-commissioned officer” (Jörg G., Personal Communication, June 4<sup>th</sup> 2017, p. 3). Jörg grew up near Dresden. He described how his family was deeply impacted by World War II and how that established a strong anti-fascist world view in the family, in particular because his great uncle, who printed anti-Hitler and anti-war pamphlets, was sent to a concentration camp for doing so (ibid., p. 1). Jörg stated: “During the long hours [of the shifts] we also started talking about ‘what if’ (someone from the GDR tried to escape). Very early on, a soldier told me during our shift that if he saw someone, he would shoot, but not target the person, only shoot pro forma, so that he would not be punished himself should the escapee be successful in their attempt. I repeatedly heard this opinion during talks and then embraced it myself” (ibid., p. 7). Jörg believed he would have conscientiously evaded this order by not using his weapon to halt an escape attempt, but by trying to not get caught doing so.

To this day, working as he does now for a Christian institution, he believes that any religion which transmits the underlying values of mercy, justice, love, and tolerance contribute towards pro-social conduct (ibid., p. 2). Initially, Jörg was relieved to find out that he was to become a member of the border guards, rather than being drafted into the infantry, as he was dreading the supposed hazing that he believed would be worse in the general NVA (ibid., p. 3). The young man’s take on having to fire on people changed to not wanting to shoot subsequent to talking to other comrades about the issue. Reflecting on this today, Jörg observed that he was lucky with who his comrades were, and while he feels fortunate about never having been confronted with the dilemma of having to shoot or not, he still feels guilty for being a part of the general wrongdoing (ibid., p.9).

The third individual to be discussed is Herbert X. (R 394), who served between 1972-1973 and stated, similarly to Jörg, that he had decided to shoot if he noticed an escapee, but that he would not have targeted the person. He also described a situation where he detected a small group of people near the border, and rather than firing a warning shot, he blew his whistle to stop them (a warning shot would have been heard by other guards and formal procedures would have had to be commenced). He then simply informed the people that they should avoid the area near the border and conscientiously let them go with no further consequences for anyone (Herbert X., Personal Communication, June 7<sup>th</sup> 2017, p. 6). Had Herbert been caught letting the people go, one would expect that both the Stasi and the border guard authorities would have taken action. In his last term, Herbert described having had a great unit, who trusted each other and agreed that everything that happened in the group would stay in the group (ibid., p. 7). Herbert also stated that it was for the better that he and

his comrades never publicly criticised the regime and the firing order, because then they would have been replaced by guards who would have had no problem obeying the firing order (Questionnaire responses, p. 11).

#### **6.4.2. Lack of authorisation**

The present section explores how the three former guards described their superiors and how they perceived the authorisation to use lethal force, for the purposes of establishing whether the lack of authorisation and their respective superiors played a role in their conscientious refusal of the use of lethal force against civilians.

Richard said: “our ‘class enemy’ was more or less the officer caste and the NCO caste, the Party, the functionaries, the army and really the entire GDR” (Hebstreit, 2007, p. 38). However, he described a wide variety of superiors, not only the *bad ones* (Hebstreit, 2007, pp. 52-58). Even today, Richard remains critical of any authority or political system, which was reflected in his memoirs and throughout his answers in the questionnaire. For example, he is not supportive of Germany’s current political direction and military engagements, but says the major difference between then and today is that now he does not need to keep his mouth shut (ibid., p.9). Looking back at his time with the border guards, he described: “we did not feel like we were protecting the state, on the contrary, we felt like we were being used to play the prison guards of an entire people” (Hebstreit, 2007, p. 20). Accordingly, Richard clearly believed that the whole regime had a lack of legitimacy. In Chapter Two, it was discussed how the modification of the authority variable in the Milgram experiments increased the levels of disobedience.

By contrast, Jörg grew up believing in socialism, and while he saw and read about the flaws of the political system, he was not generally opposed to it (Jörg G., Personal Communication, June 4<sup>th</sup> 2017, p. 2). He remembers his service (especially the first six months of training) as a time of comradeship and bonding (rather than hazing from older recruits or harsh superiors) (ibid., p. 3), noting “I realise that I was lucky with my unit” (ibid., p. 4.). “We supported each other, and I believe it was of particular importance that we had the luck to be trained by a pedagogically advanced and experienced captain, who was humane, and at the same time, that we had a demanding superior whom we did not want to disappoint” (ibid.).<sup>343</sup> Jörg described how the officers were very reasonable in explaining the firing order: “it was often laid out and emphasised that the enemy would be expected from the West, that if the border crossing originated from the East, the guards would most likely be able to halt the person using other means, and that lethal fire power was only to be used as a last resort” (ibid., p. 5).

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<sup>343</sup> Jörg continued that: “until this day, I am grateful to him; next to my comrades, he was influential in the development of my self-esteem” (Jörg G., Personal Communication, June 4<sup>th</sup> 2017, p. 8).



Herbert recounted that his direct superiors had a very loose approach towards the need to catch escapees: “during my first shift, my platoon leader simply fell asleep. This meant for me: my life here will be calm. The other platoon leaders were like that, too. Therefore, it seemed that having to shoot would never have to become an issue” (Herbert X., Personal Communication, June 7<sup>th</sup> 2017, p. 4). He proceeded to note: “We actually felt like equals among the platoon leaders and the guards, and in my experience, I would have thought not one of us would have shot. Yet, of course, that was my own feeling and interpretation” (ibid.). “I was actually surprised to later learn on the internet forum [where the questionnaire was posted] that other former guards held very different opinions, and had very different experiences” (ibid.).

Herbert also had a positive experience with his direct superiors: “We were very lucky with our superiors. We only had such a good time because the superiors allowed this to happen. Everything was dealt with within the company, the worst that could happen was to be summoned to the company commander for a lecture and to receive a curfew” (ibid., p. 8). The respondent also realised that other companies were very different, observing how “Our company commander was hoping for a promotion and therefore sought not to have any offences leave our company”. Herbert also reported that one sergeant admitted to him that he was also pressured into the service by the Stasi and really did not care about the border, while another platoon leader escaped in 1973 (due to private and professional demands) (ibid., pp. 8/9).

In all three cases, the lack of authorisation to use lethal force had different origins. For Richard, the entire regime was illegitimate, including the use of guards to imprison citizens. Jörg initially adopted what he described as a *naïve* representation of the use of lethal force, which he believed to be reasonable until he learned more about the context. Finally, Herbert experienced a generally loose approach from his superiors, who were mainly interested in not having to deal with any negative incidents at all. None of the three respondents experienced their superiors as emphasising the need to use lethal force to halt border crossers. However, all three found a *supportive* environment for their views, whether among their immediate comrades, who shared their views, or with the authorities who were (more) accepting of conscientious disobedience.

#### **6.4.3. Failure of indoctrination**

As discussed in Chapter Three, the second factor that can contribute to why individual guards conscientiously objected to carry out orders is the failure of indoctrination and the lack of the normalisation of violence. With respect to the case at hand, this would mean that the Stasi’s indoctrination failed: who the enemy was, and that it was lawful to shoot them in their escape attempts. In the case of East German border guards, the failure of indoctrination was interlinked with the lack of authorisation: yet, while the latter relates to the authority issuing the order not being perceived as the authority demanding the execution of the firing order,

the former concerns the absence of the adoption of the *Haßbild* and (class) enemy (failure of de-humanisation). More specifically, it means that conscientious objectors realised that an ordinary civilian who simply wanted to escape the regime was not an enemy or criminal as the law suggested.

Some former guards, including Richard, stated that they realised that the true intent of the Wall, and by extension the task of the guards, was to incarcerate their own people, rather than serve as a legitimate protective barrier. He wrote: “Even the dumbest soldier could have been able to see that the border did not protect the GDR, but kept people from fleeing” (Hebstreit, 2007, p. 49). Richard further stated “we young recruits perceived the political education/indoctrination as uninteresting, full of lies and not relevant for practical issues” (Hebstreit, 2007, p. 15). His father, who was a private businessmen, openly complained about the system, while his mother was worried that the children would say the same things in school (Hebstreit, 2007, pp. 59-60). “We children understood quickly that we spoke differently in school (especially in political education) than we did at home” (Hebstreit, 2007, p. 60).

Jörg, whose parents strongly believed in socialism, always liked to read books and, indeed, he described himself as a bookworm (Jörg G., Personal Communication, June 4<sup>th</sup> 2017, p. 2). While he adopted a pacifist worldview, the indoctrination was successful in his case until a specific turning point: when he learned from someone he trusted that some escapees in fact might be innocent and that it would be the right thing *not* to shoot. Until then, he – in line with GDR propaganda - mainly expected deserters and criminals to attempt to escape (ibid., p. 7).

Herbert, by contrast, came from a different background, in which he was exposed to television from West Germany: “so, I grew up with the information from the West, especially topics such as ‘the Death Strip’ and ‘death at the border’” (Herbert X., Personal Communication, June 6<sup>th</sup> 2017, p. 2). He stated: “My father hated our system, and almost our entire kin lived in the West. Until 1961, we visited my paternal grandmother in West Berlin several times per year. My father crossed the border at a secret spot to procure better groceries. I knew about this story” (ibid., p. 3).<sup>344</sup> Interestingly, Herbert also noticed that none of his comrades appeared to have family in the West, and consciously did not mention any of his own family in the West (Herbert X., Personal Communication, June 7<sup>th</sup> 2017, p. 3). “But my dad told me that some children also told on their parents during the Nazi era, who were subsequently brought into jail, and that I probably did not want that. ... What is discussed at home, stays at home. I was not to tell that to anyone” (Herbert X., Personal Communication, June 6<sup>th</sup> 2017, p. 5). He said he also learned as a child, not to accept everything he was told in school, as he always heard something else from his family and on television (ibid.). During school, in the citizenship class (*Staatsbürgerschaftskunde*) he said,

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Herbert’s parents in fact attempted to leave the East, trying to find work and housing in the West, but due to the fact they could not get permission (Herbert X., Personal Communication, June 6<sup>th</sup> 2017, p. 3) and his sister was engaged and did not want to live in the West, the family decided not to take up the opportunity to stay with their grandmother in West Berlin on August 10<sup>th</sup>, 1961 (ibid., p. 4).

all he did was recite what was expected in order to get his grades, yet, he never shared what he truly thought with his class (ibid.).

The family background of all three guards thus appears to have been a prominent factor in whether or not they were responsive to the socialist indoctrination. In the cases of Richard and Herbert, a strong link with the family's political view and relations to the West was influential, whereas, for Jörg, who grew up believing in socialist values, he only came to doubt the use of lethal force during the course of his service. In some other not included cases, other background values that made political indoctrination less successful were religious in nature.<sup>345</sup>

#### 6.4.4. The power of humanisation

The process of *de-humanising victims* occurred through the creation of laws that turned people who simply wished to leave the country into criminals, as well as via the production of the *Haßbild* or *Feindbild* rhetoric that framed everyone who was not supportive of the SED as an “enemy” of the regime. The potential reasons why these specific respondents did not view border crossers as enemies or criminals can be discerned from their answers in the personal communications.

For Richard and Herbert, who both had extensive family connections in West Germany, border crossers were never seen as the enemy per se, but rather as humans like themselves, in part, because both former guards had also considered deserting and thus did not de-humanise others who did attempt to leave. They never adopted a *Feindbild*, as they themselves fantasised about leaving the GDR (Hebstreet, 2007, p. 19).

Herbert regularly received visits from and spoke with his kin in the West, while, for example, his cousin occasionally sent care packages consisting of West German products (Herbert X., Personal Communication, June 7<sup>th</sup> 2017, p. 2). Herbert knew that his family, other people in the West, and those who wanted to live there were thus not evil, but rather simply “people like you and I” (Herbert X., Personal Communication, June 6<sup>th</sup> 2017, p. 5). Furthermore, his view of escapees was *humanised* by virtue of knowing two students during vocational training who also attempted to flee to the West. Herbert admired their courage and had a clear picture that people who tried to escape were not criminals, as he had been regularly told in class (Herbert X., Personal Communication, June 6<sup>th</sup> 2017, p. 2). “The people I knew also

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<sup>345</sup> The construction soldier, Stefan Wolter, who was drafted in 1985, reported “As a believing Christian, I have to adhere to the 5<sup>th</sup> commandment: Thy should not kill and for that reason I cannot reconcile with my faith to serve as a weapon” (Wolter, 2005, p. 35). He became a conscientious objector who also wrote an autobiography about his experience. As a son of a clergymen, he had religious reasons for not wanting to join the military. Already in school, Wolters was exceptional, as he did not join the pioneers or the FDJ, and was the only child in his class not to do so (Wolter, 2005, p. 36). The conscientious objector Wolters refused to shoot at a high school event and was summoned to the headmaster, harassed, taken out of a maths exam, and pressured into agreeing to take part and shoot – or he would have been expelled from school (Wolter, 2005, pp. 37-38).

included my great cousin who fled to live in Düsseldorf. During my service, I noticed every moment in which I actually thought, I would have had the chance to escape myself” (ibid., p. 3). For Jörg, the humanisation of *enemies* occurred through a process of learning from his peers, as described above. Many other former guards described similar personal experiences and encounters with people who wanted to flee as key events that changed their position about the use of lethal force.<sup>346</sup>

#### 6.4.5. Exploring explanations: In their own words

In addition to looking at the failure of authorisation, indoctrination, and de-humanisation of victims, it is noteworthy to consider the conscientious refusers’ own explanations, just as we did in the case of those at My Lai. Reviewing the guards’ own words can add considerable insight into the above discussed factors.

Richard stated in his autobiography that “my education”<sup>347</sup> led me to have my own opinion. I was opposed to the social system then and today am also opposed to the existing social system, with millions of unemployed, the dangers of war and terror, the deployment of the Bundeswehr abroad and the destruction of the environment” (Hebstreit, 2007, p. 9). He thus believed that his general attitude and family were the strongest factors underlying his own refusal.

Jörg believed that his interest in literature played a major role in his formation (Jörg G., Personal Communication, June 4<sup>th</sup> 2017, p. 1). “I liked Herman Hesse and Stefan Zweig. Even though I did not always understand everything I read, I could imagine that I caught a certain pacifist worldview through reading, without me noticing it at the time” (ibid., p. 2). While his parents were socialists, Jörg found a book by Erich Loest (*Es geht seinen Gang oder Mühen unserer Ebene*, 1978) which discussed the manifold problems involved in realising socialism. “I would classify my objection to serving was not against the state or the border regime in particular, but it was of a generally pacifistic nature (ibid.). I was too naïve and not raised to object to what the state was doing. My critical thinking was more a result of opinions I took from my books, and people I admired or looked up to” (ibid., p. 7).

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<sup>346</sup> One other respondent, R 522, described how and why he came to move away from seeing border crossers as criminals: “I believed that trespassers were criminals trying to escape their prosecution. I had no information about the fact that normal people were almost unable to legally leave the GDR. I was only 19 years old, and came from Saxony where it was difficult to receive any media from the West” (Questionnaire responses, p. 20/109). “When I was drafted again a few years later, this time to the wall, I was aware of more things going on: by then I had encountered people who attempted to legally leave the GDR, and knew how they were punished by the system. That is why I definitely did not want to shoot people, even if we were immediately and clearly threatened with military prison” (Questionnaire responses, p. 23/109).

Conscientious objector Hannes Mueller also talked to people who attempted to leave the country legally (Hallbrock 2004). The deserter Rudi Thurow stated that because he saw the Stasi nearly kill someone who attempted to flee, he realised that his job was not to protect the Wall/state from criminals escaping and smugglers crossing, but rather that innocent people were being targeted.

<sup>347</sup> Jörg used the word “Erziehung” which also refers to his upbringing by his parents.

In Jörg's unit, there was one particular soldier from an earlier recruitment term, who also wanted to become a teacher and shared Jörg's interest in literature. He procured more books by Herman Hesse and helped him understand them better. Some of those talks helped Jörg to establish a more distanced position regarding the firing order, while not developing doubts about the socialist social system in general (ibid., p. 7). Jörg himself believed that in addition to this specific change of opinion, his value-system that had been transmitted by his family also played a major contribution towards making him a conscientious refuser (ibid.). To summarise, Jörg himself described his interest in literature and peer support as the key reasons for his conscientious approach.

Herbert believed that one particular personal experience with death had a significant impact on his conscientiousness and reluctance to ever shoot a person; when he was twelve or thirteen years old, he saw a girl from his school get killed in a car accident (Herbert X., Personal Communication, June 13<sup>th</sup> 2017, p. 1). He watched the girl die in a puddle of blood, until her last twitches subsided. Subsequently, Herbert suffered from nightmares for a long time (ibid.). "Death scared me. I could never harm others" (ibid.). Herbert also said "there are certain things no threat of punishment can help you overcome. I always knew I could never ever shoot someone". "It was unimaginable to cause someone to die. There are certain things you just can't do" (ibid.).

In all three of the cases presented in this chapter, the unwillingness to carry out the firing order can be explained by looking at environmental, social, and personal factors that may have played a crucial role, most prominent among which are possibly the peer groups that allowed the formation of conscientious defiant thoughts.

## Conclusion

The first section of this chapter examined the illegality of the so called firing order, an order that was lawful according to positive GDR law, in which the attempt to leave the state was criminalised and various firearms regulations justified the use of lethal force to halt border crossers. Yet, it has been argued (by the German courts after unification) that the laws were illegal as per international law (in particular, the ICCPR), as well as being null and void according to natural law, and that if the guards knew or felt that the orders were wrongful, then they had a duty to disobey. The first lesson to be drawn from the study of former East German border guards presented in this chapter is that, according to legal practice, orders do not have to be (as) *manifestly illegal* (as proposed in Chapter One) to create sufficient grounds for prosecution of individual soldiers. This applies to cases in which a regime change occurs.

While the theory-practice dichotomy, as discussed in Chapter One, suggests that soldiers only have a duty to disobey the most obvious illegal orders, the prosecution of former GDR border guards mitigates this picture. One has to keep in mind, however, that the prosecutions and convictions of the guards occurred in the aftermath of a regime change. Without the fall of

the Wall, the shooters would have continued to have been rewarded and decorated for their obedience by authorities.

The specific context is a crucial aspect of the soldier's dilemma. Interestingly, in My Lai the obviously or manifestly illegal order did not have legal consequences for those soldiers facing the dilemma, where, indeed, the context also played a pertinent role: only lieutenant Calley, who gave the order, was found guilty, yet shortly after receiving his three-year sentence he was pardoned by then President Nixon. Along those lines, one might wonder the following: had the U.S. soldiers who were involved in the My Lai massacre been prosecuted by an independent or Vietnamese court, the outcome would likely have been very different. It goes without saying that had the Wall not fallen, the former guards would not have been held responsible by East German courts. This alludes to the fact that soldiers may be more likely to be held responsible in cases of victor's justice.

In East Germany, the position of former guards was further complicated by the fact that they not only received – according to GDR law – lawful orders that authorised the use of lethal force to halt border crossers, but also due to the fact that the Stasi attempted to only select supporters of the regime to serve at the border, to indoctrinate guards that all border crossers were enemies and to punish disobedience and nonconformity in all forms. The Stasi also rewarded guards who halted and shot crossers, while punishing those who did not. Despite the Stasi's best efforts to inculcate complete conformity, around 25% of those former guards who responded to the questionnaire thought it was wrong to use lethal force to halt so called criminals (42 of 157).

The examination of conscientious disobedience within this specific case study has demonstrated that the guards' expression of their unwillingness to shoot can be included as a form of direct disobedience, that is, as cases in which guards expressed their (hypothetical) disobedience towards their superior with the risk of facing the consequences of such disobedience.

Illustrative in this respect were the failures of otherwise effective factors that contribute to obedience and conformity in the three individual former guards, respectively, who displayed some differences and some similarities with each other in terms of their backgrounds and values. Richard and Herbert generally opposed the regime, while Jörg did not. The former two watched West German television, while the latter did not. In the case of Richard, his comrades played a major role in his autobiography and his reflections on the past, always referring to a group of peers, who decided that "they" were not going to shoot. They also made loose plans together to desert and did not believe in the authorisation of the firing order, which testifies to the fact that their indoctrination was unsuccessful. Similarly, the three cases examined in My Lai were also suggestive of the fact that peer support, or the lack thereof in the specific case of Bernhardt, played a crucial factor in their respective nonconformity and disobedience.

As discussed in the case study on conscientious disobedience in My Lai, personal background and family upbringing may have helped individual soldiers to not de-humanise the Vietnamese and normalise the abhorrent behaviour of their comrades. In the East German case, the fact that Richard had family in the West and wanted to flee himself helped to explain why he did not de-humanise the border crossers. Herbert also had family in the West, and, indeed, his family was inclined to live in the West. Herbert's father was outspoken (at home) about the system, which most likely also helped Herbert to not believe in the SED's propaganda. Herbert himself believed that, because he witnessed the death of a girl, he would have been incapable of ever killing a person. Jörg, who became a cadet at a young age, grew up in a family that believed in the regime, and so in his case, the authorisation and indoctrination was successful until the point at which he was introduced to alternative ideas, in literature and via his peers, with whom he shared many interests and whom he deeply admired.

In all three of these cases, background values played a major role, along with a supportive and conscientious environment and friends. Despite the fact that the SED attempted to weaken the trust guards placed in each other, being able to trust one's comrades was crucial in all three of the examined cases.

# CONCLUSION



*from the 'power of the situation' to 'the power of the individual'*

A soldier at the end of the chain of command receives an illegal order. What is she or he to do? Legally speaking, they must disobey if they know, or should have known, that they were ordered to commit a crime, according to the widely accepted manifest-illegality rule. In the event an investigation is made into the incident and in case a criminal prosecution were to result, the soldier can not (completely) rely on the defence of superior orders. However, at the time the order is given, the soldier has to be prepared to face possible immediate consequences for the disobedience. The soldier's superior may not *welcome* disobedience because either the disobedience draws attention to the fact that the commission of a crime was ordered, or the soldier is mistaken and the disobedience was unjustified. Moreover, disobedience itself constitutes a criminal offence in the military, except in cases when soldiers have received illegal orders. Yet, as alluded to above, the illegality of an order will be determined by (military) courts retrospectively, leaving the soldier at the end of the chain of command in a dilemma. The present study discussed this dilemma from a multi-disciplinary perspective.

More specifically, it aims to answer to the research question of *how and why soldiers refuse to obey illegal orders*. The previous chapters presented the theoretical framework that was developed in the course of the study to explain *why* soldiers might disobey, while a taxonomy was proposed to differentiate between ways of *how* soldiers disobey. The framework and methodology were applied to two case studies: illegal orders received by American soldiers in My Lai (Vietnam) and border guards in East Germany.

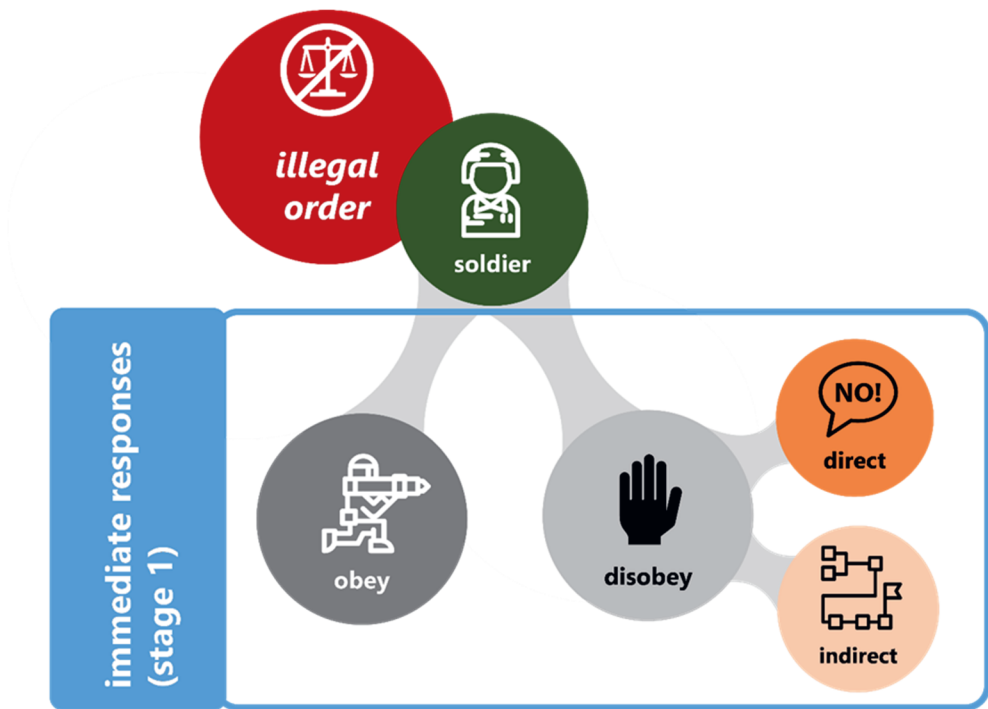
The next section summarises the findings and conclusions of each chapter. In particular, it is explained how the first four chapters of the study contributed to the development of the theoretical framework and summarises the findings that resulted from applying the theoretical framework to the case studies in Chapters Five and Six. The remainder of the Conclusion discusses the limitations of the theoretical framework and directions for future research. Finally, the last section concludes with offering some thoughts on the possible impact the present study could have on military institutions.

## **I Answering the research question**

Based on the legal-theoretical analysis of illegal orders, previous research findings from social psychology, relevant factors impacting soldiers in the military environment, and an analysis of unique primary data of soldiers who disobeyed, the study sought to answer the research question: how and why do soldiers refuse to obey illegal orders? In order to answer this question, this study developed a theoretical framework that can help explain why soldiers

disobey, and a taxonomy of conscientious disobedience that describes how soldiers can disobey.

When it comes to the question of how soldiers can disobey illegal orders, the present study posits to distinguish between two forms of disobedience. Immediately upon receiving an illegal order, soldiers can respond in two forms to the order: either they obey, or they disobey. This binary distinction results from the taxonomy of conscientious disobedience as explained in Chapter Four, see Figure 5 below. If soldiers do not obey, they can either directly express that they will not obey, -or they can disobey indirectly.



*Figure 5 Taxonomy of conscientious disobedience – immediate responses (stage 1)*

Indirect disobedience, or evasion, encompasses any behaviour other than obeying the order or directly refusing to carry out the order. For example, indirect disobedience is versatile and extensive, it can embody endless measures, such as pretending to carry out the order, asking for clarification, purposefully misunderstanding instructions, or injuring oneself (et cetera). As opposed to direct disobedience, indirect disobedience can remain undetected. The present study draws attention to the existence of indirect disobedience which is of pertinent

significance to the soldier who does not want to perpetrate a crime but also fears confronting his superior or the consequences of (direct) disobedience.

In order to understand and explain reasons *why* a soldier disobeys, the theoretical framework proposes to examine factors in three interactive dimensions. The framework suggests examining multiple interactive factors which each can impact the soldier's perception of the illegality of the order and the resulting disobedience. The theoretical framework rests on the existing understanding of how environmental and social factors impact soldiers who obey illegal orders and proposes to take into account cognitive processes that are believed to play a determining role. The goal of using this systematic approach is to discern which factors may have an impact upon whether the individual soldier perceives an order as illegal and why a soldier may resist succumbing to the powerful social and environmental forces.

Firstly, one should take into account the respective war context and the military institution in the macro dimension as environmental factors from which the illegal order originates. Examining factors in this dimension contributes to a better understanding of how broader, contextual influences impact the individual, for example, how the soldier was trained by which branch and who was considered the enemy at that point in time. Looking at factors in the macro dimension is necessary not only to help explain how the order in question came about, but also to discuss the illegality of the order and to explore the soldiers' duty to disobey.

Secondly, in the meso dimension, social forces can further hinder or enhance a soldier's disobedience. The meso dimension comprises factors interacting with and impacting the individual's perception of the illegal order and his cognitions about the situation. In particular, looking at the role played by the superior and comrades, as well as their respective responses to the illegal order can reveal factors that may have contributed to the soldier's disobedience.

Finally, in the third dimension- when explaining why a soldier disobeys, it is paramount to incorporate personal – or micro - factors that interact with factors in the other dimensions and that have significant impact on whether an order is recognised as illegal and why a soldier may feel empowered to disobey. In this micro dimension, the soldier's own cognitions, self-identity and possible personal experiences influence to what extent the soldier activates moral disengagement mechanisms, summarised as authorisation (of violence), routinisation (of violence), and de-humanisation (of victims) that are commonly reinforced in the macro dimension and perpetuated by surrounding individuals in the meso dimension, see figure 12.

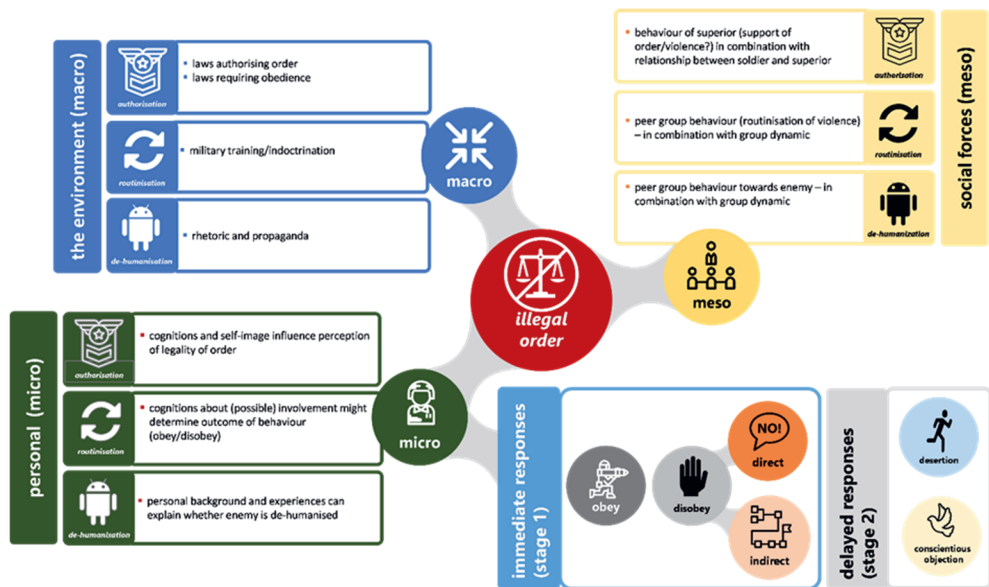


Figure 12 The theoretical framework: factors in three dimensions (why) and the taxonomy of immediate responses (how)

Each situation in which a soldier disobeys an illegal order is idiosyncratic, yet extracting commonalities and differences between conscientious refusers when examining how individual soldiers were able to sustain their independence despite powerful environmental and social forces, stresses the importance of the role the individual plays. Previous research in social psychology predominantly focussed on the overwhelming power of the situation in explaining obedience and conformity. While the external factors are also present in situations in which soldiers either obey or disobey, this study argues that it is paramount to focus on the role of the individual (soldier) as well.

In addition to explaining how and why soldiers disobeyed illegal orders, the case studies have shown that in the two examined contexts the legal consequences for obedience to illegal orders were not in accordance with what should have been expected based on the manifest illegality rule. In the case of My Lai, a manifestly illegal order was given, yet, the U.S. military and political leaders were reluctant to hold any but one individual accountable; while in East Germany, (only) after a regime change, low-ranking members of the military,<sup>348</sup> among others, were held accountable for obeying an order that was lawful according to domestic law, but that was considered illegal (retroactively, argued by some scholars) by the judges for a variety of reasons. The subsequent section summarises what has been studied and concluded in each chapter and outlines how the respective findings have been incorporated into the theoretical framework.

<sup>348</sup> The trials also included the prosecutions of high-ranking and political leaders, as discussed in Chapter Six.

## II Summary of chapters and their findings

*Chapter One* discussed the concepts of illegal orders and soldiers' duty to disobey, before proceeding to explore what U.S. military law and an international law perspective expect from soldiers who face illegal orders. A crucial distinction was proposed to be made between the commonly interchangeably used concepts of *unlawful* and *illegal*. *Unlawful* orders constitute a broader category of orders that encompasses various elements that give soldiers technical grounds to disobey. For example, unlawful orders include unconstitutional orders, orders not related to military duty, or illegal orders. *Illegal* orders belong therefore to a sub-category of *unlawful* orders, in which the soldier is ordered to carry out an act that, in itself, constitutes a crime. If a soldier perpetrates a crime because he was ordered to do so, and he was (or should have been) aware of the fact that the order was illegal, he cannot (completely) rely on the defence of superior orders, according to the *manifest illegality rule*. This rule is applied by many states. One could argue that in cases, in which it is obvious that the orders given are illegal, soldiers have a duty to disobey.

The study examined the approach taken by the U.S. military, as an example for a traditional (yet 'modern') military institution, in which the duty to disobey illegal orders is not made explicit. It was concluded that the absence of a literal duty to disobey in conjunction with a lack of institutional guidance about how to disobey, were suggestive of the fact that disobedience of illegal orders is generally not to be expected in practice. The manifest illegality rule as applied by the U.S., seems to be underinclusive in as much as all orders that fall short of being *manifestly* illegal are likely to be obeyed, despite the fact that they are illegal. In contrast, some post-modern military institutions, such as the German Bundeswehr, appear to adopt a more contemporary legal approach to soldier's decision-making and encourage soldiers' reflection when confronted with a potentially illegal order.

Furthermore, the international criminal law perspective was also addressed since domestic military institutions may not always account for the possibility that the institution issues manifestly illegal orders, -or may otherwise be unable or unwilling to prosecute crimes committed by members of their military. International criminal law is concerned with the most heinous crimes- and by extension also with respective manifestly illegal orders that lead to the perpetration of these crimes. Indeed, according to the Rome Statute, whilst soldiers are legally expected to disobey orders to commit the crime of genocide and crimes against humanity, this does not necessarily apply to orders to commit war crimes (even though the acts overlap) and soldiers have no duty to disobey the order to take part in an illegal war. Yet, looking at the example of Erdemović, if a state is involved in authorising international crimes and soldiers are subsequently ordered to carry out manifestly illegal acts, one might wonder how these soldiers at the end of the chain of command can be expected to disobey. The social and institutional responses to disobedience range from negative social consequences to detrimental, life-threatening ones. The chapter concluded that a theory-practise dichotomy exists in traditional institutions, because even though the widely accepted manifest illegality

rule exists on paper, in practice it appears that disobedience might not necessarily be expected or desired, leaving soldiers in a challenging predicament. In order to understand and explain how and why soldiers disobey illegal orders, it is therefore pertinent to examine the illegality of the order itself and to discuss the respective macro environment in which the order was given.

*Chapter Two* introduced and explained social factors that are included in the theoretical framework. First, it defined relevant social psychological concepts and experiments that have been used to explain people's tendencies to conform or nonconform to groups despite their better judgment and explored under which circumstances people tend to obey or to disobey unjust demands. In particular, the study considered *moderators* which not only potentially impact on the rate of obedience and conformity in experiments, but which are also expedient for explaining non-participation and disobedience. The chapter explained and discussed Asch's extensive body of research on conformity and the Milgram experiments on obedience as well as subsequent follow-up studies by other scholars.

Asch's conformity studies and various follow-up studies demonstrated that a high percentage of people tend to conform to group norms. Those who did not conform, Asch referred to them as "independent", appeared to have a positive self-image, some were leaders of a group or by contrast, were outsiders. Moreover, the behaviour of other people in the group had further impact on subjects' conformity: if other people acted in a nonconform manner, then nonconformity amongst the subjects also increased. When people knew they had to defend their choice afterwards, conformity rates dropped significantly. This finding could be meaningful for military institutions, in that soldiers who expect criminal investigations may be more inclined to refuse to take part in illegal conduct.

With respect to the results of the obedience studies, it appears that the most likely moderators of specific relevance to soldiers include the absence of the authority figure, having two disagreeing authority figures, and the behaviour of other subjects. In his book, Milgram referred to particular personal experiences or skills in order to explain why some subjects disobeyed. Follow-up studies found that people were more likely to disobey if they indicated their disagreement early on. More recent studies stress cognitive abilities<sup>349</sup> and (self-) identification with the authority or the group as crucial moderators.

Social psychological moderators were included in the meso dimension of the framework and subsequently examined in the case studies of conscientious refusers. In particular, the framework suggests investigating the role and behaviour of the authority figure, as well as the behaviour of the comrades. The role of the individual soldier in his immediate surrounding should be explored as well. In the micro dimension, one should seek personal

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<sup>349</sup> Subsequent studies on personal factors established that refusing individuals also scored higher in social responsibility, which is to say that they personally attributed more responsibility to their own behaviour (Schurz, 1985). This was formerly understood as dispositional factor, but contemporary scholar would likely include "social responsibility" as a cognitive factor.

information about the individual soldier in terms of his cognitions about the order, his self-image and his personal experiences that may have shaped his perception and decision not to carry out the illegal order.

*Chapter Three* explored ways in which soldiers are affected by being a member of the military institution. It was explained how the military environment can be conducive to soldier's perpetration of crimes. More specifically, the chapter elucidated how individuals' moral self or moral compass can be disengaged via processes that facilitate the upholding of a positive self-image while perpetrating crimes of obedience. Thus, the requested violence is perceived to be authorised, the behaviour can be routinised, and cognitively downplayed, while the victim might be blamed or de-humanised. These cognitive mechanisms are central for the theoretical framework: they have been used to explain obedience to illegal orders and are therefore also crucial for understanding the counter-behaviour of disobedience as the context and social forces are shared.

The chapter discussed how the military institution differs from the civilian context and how obedience and conformity are institutionalised. It showed that the abovementioned cognitive disengagement processes can be deliberately enhanced/institutionalised by the institution as part of its systematic efforts to create a more obedient and conformist soldier. By the same token, military institutions can also encourage independent decision-making by requiring self-thinking soldiers which might be less likely to succumb to the situational forces and refrain from activating moral disengagement mechanisms. In an attempt to find out more about soldiers who refuse to obey, the chapter proposed to study the following factors in the theoretical framework: the specific military institution they belong to and how the soldiers may have been trained in the environmental dimension. In the meso dimension, one should examine the nature of the conflict, as well as explore how the conflict might affect the processes of authorisation, routinisation, and de-humanisation.

*Chapter Four* first introduced the taxonomy of conscientious disobedience, explaining *how* soldiers can disobey illegal orders. Using a selection of relevant historical examples, the taxonomy differentiated between forms of conscientious disobedience after an illegal order has been given. The first distinction was made between immediate (stage 1, as seen in Figure 5 above) and delayed (stage 2, see Chapter Four) forms of conscientious disobedience. The present study focused on stage 1 responses, in which a soldier either obeys or disobeys. While conscientious disobedience can take manifold forms, it was proposed to draw a binary distinction between direct disobedience and indirect disobedience as described above. Direct conscientious disobedience involves an overt confrontation with the superior and likely results in negative consequences for the insubordination. Indirect disobedience comprises all actions the soldier can take that allow him or her to evade having to carry out the illegal order without directly expressing their disobedience. In both cases, however, the soldier does not obey the order and therefore disobeys. Behavioural responses in the taxonomy are not static; rather, each response refers to a single incident and the same soldier might respond differently in a different situation. Hence, a soldier might obey once and then directly refuse or then

indirectly evade, which justifies why situational factors should be considered in addition to the personal factors.

Direct disobedience is not an easy endeavour for soldiers, as the previous chapters outlined. By stressing that indirect disobedience exists as an option to disobey, with a potentially unlimited amount of possibilities of room for manoeuvre, conscientious soldiers can be creative in how they avoid having to carry out an illegal order, whilst, simultaneously, not putting themselves at (too great) risk. In the final section, factors from the previous three chapters were combined into the theoretical framework for the study of soldiers who disobey illegal orders, as illustrated in Figure 12 above. The subsequent two chapters applied the proposed theoretical framework to understand and explain the disobedient behaviour of soldiers in two case studies.

*Chapter Five* revisited the study of war crimes perpetrated by U.S. soldiers in My Lai in 1968, a case that has been used extensively to explain why many soldiers obeyed illegal orders and acted in a conformist manner.<sup>350</sup> In My Lai, some of the soldiers received a manifestly illegal order to shoot unarmed and unresisting civilians. The chapter took advantage of the manifold investigations of this incident and an existing dataset of interviews to study those individual soldiers who refused to take part, which has hitherto received scarce attention.

The context and processes that explain the participation of perpetrators in My Lai was re-examined making recourse to the proposed theoretical framework of conscientious disobedience. While obedient and conformist soldiers are believed to have activated the moral disengagement mechanisms of authorisation, routinisation, and de-humanisation when perpetrating crimes, the present study examined whether the absence of the cognitive disengagement mechanisms can account for why some soldiers did not succumb to the powerful environmental forces and disobeyed. In summary, the chapter investigated environmental, social, and possible personal factors to explain non-participation.

In the cases examined, peer support and the resistance to de-humanise the perceived enemy appear to be the most likely explanations for conscientious disobedience. Direct disobedience was reported by members of a sub-group, Stanley and Maples, who had already questioned the mission the evening before. Members of this sub-group not only had support from each other, but one member was known to have a positive disposition towards the locals, which is likely to have counter-acted the process of de-humanisation. In contrast, Bernhardt, an evader, received more training and stressed in an interview that he upheld his own (military) values. As an outsider and equipped with a strong moral self-image, he may have been less influenced by group norms. The fact that the authority figure (lieutenant Calley) was not well-respected may also have contributed to the direct refusal by Maples and Stanley. While

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<sup>350</sup> The case is often also used to explain the how higher-ranking members of the military failed to prevent the atrocity.



social psychological explanations constitute an expedient “lens” for understanding disobedience, at this stage of the development of the theory, they should be treated as tentative explanations.

*Chapter 6* explored a controversial issue and applied the theoretical framework to understanding disobedience in response to (illegal) orders in East Germany. In particular, the chapter discussed the illegality of orders that led to the shooting of (mainly East German) civilians at the inner German border during the time of the separation of the two Germanies (1949-1989). The chapter shed light on the dilemma former East German border guards were faced with and attempted to explain their behaviour, while most previous studies focused on the legal aspect of non-retroactivity during the prosecutions of shooters.

The controversy over the “firing order” is explained: on the one hand, the firearms regulations were not manifestly illegal per se. Some argue that East German border guards were simply ensuring the sovereignty of the state (borders). However, on the other hand, people argue that the respective East German laws violated international law. Scholars assuming the latter position contested the legality of the orders because the regime criminalised any attempt to leave the country, while it simultaneously denied people basic rights, such as the right to free movement, the right to travel, and arguably the right to life, by using lethal force to keep citizens from emigrating. In addition to the standing orders to use lethal force, there could have been instances of direct (manifestly illegal) orders: for example, if soldiers were ordered to shoot unarmed and captured escapees, that is, persons who were caught when attempting to cross the border and held in custody. Furthermore, the study briefly explored the argument that the SED in fact intended to punish those who tried to leave and in doing so deter others from trying.

In an effort to find out more about the dilemma of former East German border guards, an online questionnaire was conducted and completed by 157 former guards. In the first instance the questionnaire gauged the former guards’ perception of the illegality of shooting escapees. Around one quarter of the respondents stated they did not agree with the standing orders at the time. Conversely, the majority agreed with the statement that “it was the law and therefore justified” or that “it was not their calling to make a judgment”, even in hindsight and after shooters have been held accountable. A number of respondents directly expressed their unwillingness to shoot escapees. This behaviour was classified as a form of direct disobedience because the guards confronted the authority and were willing to deal with possible negative consequences of their conscientious disobedience to the standing order.

In order to explore reasons for why guards did not want to shoot, follow-up email interviews were conducted with three former guards who expressed their unwillingness to shoot. Along the lines of the study of conscientious disobedience in My Lai, the theoretical framework was applied to understand to what extent disobedience was a result of the absence of the cognitive processes of authorisation, routinisation (in form of indoctrination in the case of East Germany), and de-humanisation that explain why other guards did not object. Two of the

guards explained that the indoctrination (and military training) was not successful, and that they never de-humanised escapees as enemies or traitors. All three guards had experienced peer support in their nonconformist position: one guard adopted the position of *shooting but missing* from a close friend, while the other two guards had peer groups that also opposed the standing order in general. One guard was interested in literature and believed that this emboldened him to maintain his moral self, while the other two were raised to think critically about the regime and had relatives in West Germany. As was the case in the previous chapter, findings from the study of former border guards are not generalisable but indicate some commonalities. In the cases examined, factors that are likely to have contributed to disobedience were identified and as such can help better understand why and how (these) soldiers have disobeyed illegal orders. The subsequent section discusses limitations of the theoretical framework and possibilities for future research.

### III Discussion and future research

This multidisciplinary approach to studying the complex phenomenon of conscientious disobedience offers an avenue through which the behaviour of soldiers can be understood and explained. The study proposed applying the theoretical framework to examine the behaviour of an individual soldier in his or her particular environment by analysing interacting factors in several dimensions and exploring reasons that are likely to have had an impact on the soldier's decision-making to disobey.

However, the depth of a multi-disciplinary analysis does not compare to the depth that could have been achieved by taking a singular approach.<sup>351</sup> Because previous research has demonstrated the significant impact of the environment and social forces in cases of obedience to illegal orders, the present approach also chose a multidisciplinary approach for understanding disobedience.

The study did not include an exploration of normative reasons for why soldiers *should* disobey. Instead of the deontological perspective, the legal-philosophical discussion examined what the respective legal approaches prescribe, resting on the assumption that soldiers should not commit crimes under orders. Yet, in the future, it would be worthwhile to study conscientious disobedience from a deontological perspective as well. In general, further research in other disciplines or additional cases would contribute to a more substantiated understanding but may also propose adjustments or alterations of the theoretical framework offered in the present study.

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<sup>351</sup> For example, a purely psychological approach to understanding and explaining the behaviour of an individual soldier could have aimed at conducting multiple personal interviews and tests with the soldier, and interviews with members of his family, comrades, and the respective superiors to fully understand the psychological dimensions. Given the sensitive nature of the topic of illegal orders, such an approach would have been contingent on the access to and willingness to talk by more than one individual.

The case studies suggest that disobedient soldiers share resistance to succumbing to powerful external (social) forces. As discussed in the Introduction, case studies allow exploring and understanding a phenomenon based on a particular real-life event. The present study argues that each (studied) disobedient soldier has had unique personal factors that interacted in an unaccounted way with the environment leading to conscientious disobedience. Drawing generalisations from these case studies and developing causal explanations on this basis is complicated, not to mention that the factors are interacting. Therefore, a crucial limitation manifests itself in that it remains unknown how the assumed personal factors may interact with the social (external) moderators. However, the study proposed that certain external factors are likely to contribute to the soldier's cognitive processes leading to disobedience.

For example, the American soldiers Maples and Stanley in the My Lai case did not perceive the given order as legal and furthermore found peer-support in each other. Others, like Bernhardt (My Lai) or Hebstreit (East Germany), seem to have benefited from an independent self-image, and also did not perceive their orders as lawful. Yet, personal factors of each individual soldier may also impact factors in their respective environment, for example through a form of self-selection: a soldier with certain cognitions about the "enemy" might surround himself with peers who think similarly.

Without knowing to what extent individual factors are influenced by external factors and vice versa, cases of conscientious disobedience are often based on self-reported behaviour. As discussed in the Introduction, (self-) reported behaviour is, among other limitations, affected by hind-sight bias and therefore lends itself to conscious and unconscious cognitive manipulations. Because the study relies on (self-) reported behaviour, it does not account for soldiers who secretly evade and never talk about their disobedience. Studying conscientious disobedience relies on a limited number of reported accounts, likely without being able to establish absolute numbers and verify how many soldiers indeed disobeyed. Furthermore, with respect to indirect forms of disobedience and especially hypothetical statements made in the East German border guards case study, there might be no corroborating evidence for their statements. Thus, some evaders might have claimed that they evaded when in fact this was not the case, -or would have not been the case. These hypothetical answers must thus be treated with much caution and possible biases and the limitations of self-reported behaviour should be kept in mind when examining and explaining soldiers' (reported) disobedience.

At the same time, the soldiers' own ex post facto explanations offer an interesting starting point for understanding factors in the personal dimension. The proposed theoretical framework constitutes a novel approach which is to be developed further. The subsequent section suggests some possibilities for further development and application, in addition to the above-mentioned deontological approach.

Studying delayed forms of conscientious disobedience (stage 2) went beyond the scope of the present research and were mainly disregarded, due to the difficulty of establishing a clear causal link between an illegal order and the delayed forms of conscientious disobedience, i.e.

desertion and conscientious objection. Other events that occurred prior to having received an illegal order may have motivated the soldier to desert or apply for the status of conscientious objector. Furthermore, in delayed forms of disobedience more time passes by between the issuance of the illegal order and the response, allowing for other additional events to occur and have an impact upon soldiers' decision-making to disobey.

Yet, these forms of conscientious disobedience can be considered in future research and might be of particular interest to those scholars who study selective conscientious objection in cases of illegal wars. Similarly, a related subject that could be explored further by applying the theoretical framework concerns whistle-blowing in the military: soldiers who witness wrongdoing of members of the institution are influenced by the same environmental and social forces that interact with personal factors when soldiers receive an illegal order. The proposed theoretical framework could also be used as a tool to understand and explain the decision-making of bystanders to wrongdoing. Future research could encompass cases of conscientious responses concerning situations in which the wrongdoing was not the result of an illegal order.

The present research focussed on the dilemma of soldiers at the very end of the chain of command. Yet, the role of commanding officers is, as reflected in their representation in the theoretical framework, of outmost importance for understanding the phenomenon of conscientious disobedience. Officers can play a crucial role in the prevention of wrongful conduct (Bradley, 2011; Rockwood, 2007; Tripodi, 2011a, 2011b). As prominently discussed in academic literature, superior officers bear (command) responsibility, receive extensive training and education and are in many institutions required to make independent decisions. While the present study sought to add the perspective and role of the enlisted (that is low-ranking) soldier, the research did not intend to undermine the role of the superior, as has been stressed by other scholars and as suggested by looking at the behaviour of major Trapp, discussed in Chapter Four. Therefore, in the future, the framework could be applied to understand and explain conscientious disobedience on the level of the officers, who are arguably more heavily impacted by factors in the macro dimension and are in a different way exposed to social forces in the meso dimension.

Applying the theoretical framework to additional case studies would not only contribute to a growing body of research, but the framework could thereby also be expanded to include a broader category of wrongful orders. Above, it was alluded to that the framework could be applied to studying orders to deploy to a war that is perceived as unlawful. A further, also related, issue concerns orders to abstain from taking actions to halt crimes from occurring. As mentioned in Chapter Four, captain Rockwood received the order to refrain from visiting a prison. This order does not appear illegal *per se*, as not going to a certain place does not constitute an obvious instruction to commit a crime. Yet, Rockwood wanted to investigate reports he received about torture taking place at the prison (Coughlin, 1995; Pierce, 2002; Wrage, 2002). His superiors arguably knew about the allegations but nevertheless did not want Rockwood to interfere. Consequently, one could argue that, if Rockwood's superior

officers were aware of crimes being committed and refused to let Rockwood take action to halt them, such orders may fall under the in Chapter 1 proposed definition of wrongful orders. This category of orders also includes other (not manifestly illegal) orders in the context of humanitarian missions, which result in the inability of UN troops to prevent or intervene in atrocities they witness, as for example was the case in the 1990's in Rwanda or Srebrenica (Power, 2002).

Furthermore, in some traditional military institutions, a common trend in development is the privatisation and outsourcing of tasks reserved for the military (Mandel, 2001; P. W. Singer, 2003). While some scholars see opportunities for the effectiveness of private operations and the increased professionalism of the troops, the lack of regulations, oversight and diffusion of responsibility might negatively impact the conduct of private soldiers (Holmqvist, 2005; P. W. Singer, 2003, p. 227). The subject of conscientious disobedience to illegal orders in private military organisations has, in this research, not been studied but could be explored in the future.

A final comment on gender. Increasingly, military service personnel may represent genders other than male. The role of non-male soldiers was not addressed, but it could indeed in the future be examined as a factor in itself along the lines of “to what extent could gender/identification impact upon soldiers’ conscientious disobedience”?

In sum, future research could explore conscientious disobedience to wrongful orders in other contexts, study the behaviour of officers and private soldiers, and expand the understanding of conscientious disobedience by adding more cases and as well as by possibly taking a deontological perspective.

## **IV Final thoughts**

To this very day soldiers continue to face the very dilemma discussed in this study. The present section reflects on the institutional willingness to ameliorate the situation of the soldier and concludes with suggesting the impact the present study could have. As seen in the case studies, depending on the macro and meso dimension, soldiers may arguably be “better off” obeying illegal orders in many contemporary military institutions. This is especially the case, when military institutions are reluctant to make the existence of illegal orders public and refuse or hinder prosecution of superior officers. Members of the military appear to be protected by the domestic environment as long as the illegal actions remain (relatively) unknown.

As alluded to in the case studies, investigations into illegal orders conducted by military institutions may be compromised by protection mechanisms and (face-saving) interests of the institution, as well as of the government. Investigations may only commence after the military institution has been (publicly) accused of ordering the crime, or after the government

that authorised illegal orders is no longer in power. It appears that high-ranking members of the military and political authority figures are more likely to be held accountable, only after a regime change occurs, as was the case in East Germany and Nazi Germany. When it does come to (internal military) investigations into illegal conduct, low-ranking “executors” may become the first ones to be accused, as was the case in East Germany and to some extent also in My Lai, where only one officer was found guilty. Enlisted soldiers appear to find themselves in a disadvantaged position: not only are they the ones who are confronted with the dilemma if they are to execute the order as they have to perpetrate a crime, but also are they the ones that are easiest to blame. Yet, as discussed, at the time soldiers receive illegal orders, disobedience may not occur as a choice to many soldiers.

If soldiers are expected to disobey illegal orders to spare innocent human life, like the young soldier Erdemović, this leads to the question whether military institutions are indeed willing to make changes and recognise lower-ranking soldiers’ responsibility and ability to make conscientious decisions in such circumstances.

As discussed in Chapter Three, empowering soldiers may not constitute a priority for every military institution, especially given that traditional, hierarchical institutions might value *reflexive* obedience more than *reflective* obedience, the former demanding soldiers’ obedience in form of a reflex, without (much) consideration, and the latter expecting (some) reflection on what they are being asked to do and the impact of their actions. In contemporary military operations, soldiers are often confronted with situations lacking clear-cut distinctions between the enemy and protected civilians. Soldiers should be equipped with knowledge of the context and the civilians they have to interact with, so that they can make better, reflective decisions (Krulak, 1999; Talbert & Wolfendale, 2019; Wolfendale, 2007, 2009). Findings from the case studies suggest that interaction with the population in question reduces the risk of de-humanisation and may contribute to disobedience to illegal orders.

Traditional military institutions could, *if* they desire, learn from the approach adopted by several post-modern military institutions, like the German Bundeswehr. According to the approach taken in this army all soldiers are encouraged to reflect on the legality of orders given. Yet, that *if* is a big *if*, as the empowerment of soldiers and the reinforcement of soldiers’ individual decision-making capacities may be at odds with the fundamental pillars upon which the traditional institution rests. Military institutions interested in strengthening soldiers’ position and ability to disobey illegal orders could be encouraged to examine the practical and institutional support for conscientious disobedience, as this practical aspect has not been dealt with in the present theoretical and empirical study. Military institutions, if interested in a change towards more “independent” soldiers, could, for example, consider introducing significant adjustments to current training. For example, training could be aimed towards reinforcing moral *re-engagement mechanisms* which counteract the cognitive processes of authorisation, routinisation, and de-humanisation. Soldiers, not only officers, could benefit from the formation of a positive *moral* self-image. In addition, creating a positive *moral* group-image could become part of the training goals. Since peer support

appears to be a significant moderator for conscientious disobedience, the intentional reinforcement of sub-groups could be explored as a means through which to also increase soldiers' moral agency.

Finally, the subject of the present study should be addressed: what can the enlisted soldier at the end of the chain of command do when he or she receives an illegal order? The present study has illustrated that despite extraordinarily adverse environmental circumstances and irrespective of powerful social forces, some individual soldiers defy the odds and conscientiously disobey. Some soldiers directly stand up to their superior. Direct disobedience, despite the existence of a legal duty to disobey illegal orders, could rather be considered an act that goes beyond the soldier's duty, that is, as an act of supererogatory nature, if one takes into account the actual social factors and consequences the act might entail for the individual soldier.

For those soldiers who consider direct disobedience unfeasible, they could be encouraged to seek ways to disobey indirectly. The dissemination of cases of indirect conscientious disobedience could further strengthen a more independent and empowered moral self-image of soldiers, allowing soldiers to regard themselves as moral agents which can counteract moral disengagement mechanisms. In publishing and distributing this manuscript, hopefully attention is drawn to the importance of the decision-making of every soldier. As a take-home message to the soldier: if other soldiers found a way to resist succumbing the powerful environmental forces – so can you, be that by directly confronting your superior or by indirectly exploring any other course of action to avoid doing something that you know to be wrong.

# Summary

Soldiers who receive an illegal order find themselves in a dilemma: they must make a choice between refusing to obey their superior or committing a crime. This study takes a multidisciplinary approach to better understand and explain how and why soldiers refuse to obey illegal orders for conscientious reasons. The study aims at contributing to the academic community by proposing a novel theoretical framework that includes examining factors in three interactive dimensions.

The macro, meso, and micro dimensions of the theoretical framework bring the conflict, the military, and environmental factors together with the context of the illegal order, the role of the superior and comrades, and how the individual soldier's own cognitions, self-image and experience influence to what extent the soldier activates moral disengagement mechanisms, summarised as authorisation (of violence), routinisation (of violence) and de-humanisation (of victims) that are commonly reinforced in the macro dimension and perpetuated by surrounding individuals in the meso dimension.

The study applies the theoretical framework to two cases, the 1968 massacre perpetrated by U.S. soldiers in My Lai, and the controversial East German regulations (firing order) aimed at halting citizens fleeing to the West during the Cold War. The study distinguishes between direct and indirect disobedience. The conclusion places emphasis on the willingness of military institutions to enable soldiers to disobey illegal orders.

Chapter One discusses the concepts of illegal orders and soldiers' duty to disobey, before proceeding to explore what U.S. military law and an international law perspective expect from soldiers who face illegal orders. Illegal orders belong to a sub-category of unlawful orders, in which the soldier is ordered to carry out an act that, in itself, constitutes a crime. If a soldier perpetrates a crime because he or she was ordered to do so, and they were (or should have been) aware of the fact that the order was illegal, they cannot (completely) rely on the defence of superior orders, according to the manifest illegality rule. One could argue that soldiers have a duty to (only) disobey manifestly illegal orders.

Furthermore, according to the international criminal law perspective, whilst soldiers are legally expected to disobey orders to commit the crime of genocide and crimes against humanity, this does not necessarily apply to orders to commit war crimes (even though the acts overlap) and soldiers have no duty to disobey the order to take part in an illegal war. The chapter concludes that a theory-practise dichotomy exists in traditional military institutions, because even though the widely accepted manifest illegality rule exists on paper, in practice it appears that disobedience might not necessarily be expected or desired, leaving soldiers in a challenging predicament. In order to understand and explain how and why soldiers disobey



illegal orders, it is therefore pertinent to examine the illegality of the order itself and to discuss the respective macro environment in which the order was given.

Chapter Two introduces and explains social factors that are included in the theoretical framework. The study considers moderators, which not only potentially impact on the rate of obedience and conformity in experiments, but that are also expedient for explaining non-participation and disobedience. The chapter explains and discusses Asch's extensive body of research on conformity and the Milgram experiments on obedience as well as subsequent follow-up studies by other scholars. The framework suggests investigating the role and behaviour of the authority figure, as well as the behaviour of the comrades. The role of the individual soldier in his or her immediate surrounding should be explored as well. In the micro dimension, one should seek personal information about the individual soldier in terms of personal cognitions about the order, self-image and personal experiences that may have shaped the perception and decision not to carry out the illegal order.

Chapter Three explores ways in which soldiers are affected by being a member of the military institution. The chapter elucidates how individuals' moral self or moral compass can be disengaged via processes that facilitate the upholding of a positive self-image while perpetrating crimes of obedience. Thus, the requested violence is perceived to be authorised, the behaviour can be routinised and cognitively downplayed, while the victim might be blamed or de-humanised. The chapter proposes to study the following factors in the theoretical framework: the specific military institution the soldier belongs to, and how the soldier may have been trained in the environmental dimension. In the meso dimension, one should examine the nature of the conflict, as well as explore how the conflict might affect the processes of authorisation, routinisation, and de-humanisation.

Chapter Four introduces the taxonomy of conscientious disobedience, explaining how soldiers can disobey illegal orders. Using a selection of relevant historical examples, the taxonomy differentiated between forms of conscientious disobedience after an illegal order has been given. The first distinction can be made between immediate and delayed forms of conscientious disobedience. The present study focuses on stage 1 responses, in which a soldier either obeys or disobeys. While conscientious disobedience can take manifold forms, one can draw a binary distinction between direct disobedience and indirect disobedience. Direct conscientious disobedience involves an overt confrontation with the superior and likely results in negative consequences for the insubordination. Indirect disobedience comprises all actions the soldier can take that allow evade having to carry out the illegal order without directly expressing one's disobedience. In both cases, however, the soldier does not obey the order and therefore disobeys. In the final section, factors from the previous three chapters are combined into the theoretical framework for the study of soldiers who disobey illegal orders.

Chapter Five revisits the study of war crimes perpetrated by U.S. soldiers in My Lai in 1968, a case that has been used extensively to explain why many soldiers obeyed illegal orders and

acted in a conformist manner. The context and processes that explain the participation of perpetrators in My Lai are re-examined making recourse to the proposed theoretical framework of conscientious disobedience. The present study examines whether the absence of the cognitive disengagement mechanisms can account for why some soldiers did not succumb to the powerful environmental forces and disobeyed. In the cases examined, peer support and the resistance to de-humanise the perceived enemy appear to be the most likely explanations for conscientious disobedience. Direct disobedience was reported by members of a sub-group, Stanley and Maples, who had already questioned the mission the evening before. Members of this sub-group not only had support from each other, but one member was known to have a positive disposition towards the locals, which is likely to have counter-acted the process of de-humanisation.

In contrast, Bernhardt, an evader, received more training and stressed in an interview that he upheld his own (military) values. As an outsider and equipped with a strong moral self-image, he may have been less influenced by group norms. The fact the authority figure (lieutenant Calley) was not well-respected may also have contributed to the direct refusal by Maples and Stanley. While social psychological explanations constitute an expedient “lens” for understanding disobedience, at this stage of the development of the theory, they should be treated as tentative explanations.

Chapter 6 explores a controversial issue and applied the theoretical framework to understanding disobedience in response to (illegal) orders in East Germany. In particular, the chapter discusses the illegality of orders that led to the shooting of (mainly East German) civilians at the inner German border during the time of the separation of the two Germanies (1949-1989). The chapter sheds light on the dilemma former East German border guards were faced with and attempts to explain their behaviour.

The controversy over the “firing order” is discussed: on the one hand, the firearms regulations were not manifestly illegal per se. Some argue that East German border guards were simply insuring the sovereignty of the state (borders). However, on the other hand, people argue that the respective East German laws violated international law. Scholars assuming the latter position contested the legality of the orders because the regime criminalised any attempt to leave the country, while it simultaneously denied people basic rights, such as the right to free movement, the right to travel, and arguably the right to life, by using lethal force to keep citizens from emigrating. An online questionnaire was conducted and completed by 157 former guards. In the first instance the questionnaire gauged the former guards’ perception of the illegality of shooting escapees. Around one quarter of the respondents stated they did not agree with the standing orders at the time.

In order to explore reasons for why guards did not want to shoot, follow-up email interviews were conducted with three former guards who expressed their unwillingness to shoot. Along the lines of the study of conscientious disobedience in My Lai, the theoretical framework was applied to understand to what extent disobedience was a result of the absence of the cognitive

processes of authorisation, routinisation (in form of indoctrination in the case of East Germany) and de-humanisation that explain why other guards did not object. Two of the guards explained that the indoctrination (and military training) was not successful, and that they never de-humanised escapees as enemies or traitors. All three guards had experienced peer support in their nonconformist position.

As was the case in the previous chapter, findings from the study of former border guards are not generalisable but indicate some commonalities. In the cases examined, factors that are likely to have contributed to disobedience were identified and as such can help better understand why and how (these) soldiers have disobeyed illegal orders. Yet, while studying the behaviour of soldiers in real-life situations which significantly relies on (self) reported behaviour, the researcher must bear this possible bias in mind during the analysis of data.

In the framework, it is suggested to study multiple factors in different dimensions. However, developing causal explanations from the data is complicated, not to mention that the factors are interacting. Therefore, a crucial limitation manifests itself in that it remains unknown how the assumed personal factors may interact with the social and environmental (external) moderators.

While the suggested theoretical framework may offer a useful tool to understand and explain soldiers' conscientious disobedience, the framework can benefit from applications to other cases in the future. Presently, the study focusses on stage 1, or immediate responses to illegal orders, but as the taxonomy suggests, future research could include the analysis of delayed forms of disobedience. The theoretical framework could also be adapted to study the behaviour of members of the military at higher ranking positions. Furthermore, the concept of illegal orders could also be modified to a broader concept of wrongful orders, to include the study of orders that are not illegal per se, but that lead to crimes.

It was concluded that even though previous explanations stressed the significance of the powerful environmental factors in the perpetration of crimes (of obedience), this study emphasises the role and power of the individual and furthermore the crucial role the institution could play in enabling soldier to disobey illegal orders.

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# Appendix 1: The experience of East German border guards

## A. The Questionnaire


The present appendix offers more detailed and elaborated information about how the empirical data was gathered for the case study of East Germany.

As indicated in Chapter Six, Richard Hebstreit's publication about his own experience as border guard and rejection of the firing order and communication via email led to the discovery of the internet portal "Forum der Grenze – Augenzeugen der innerdeutschen Grenze". At that time, the platform allowed its roughly 1100 members to exchange opinions and experiences mainly about subjects pertaining to the GDR, and allowed former guards to reconnect with each other. It also allowed interested individuals, including myself to learn about the border guards.

With permission of the administrators of the forum and the approval of the board of ethics the Faculty of Law of VU University ("De Commissie Ethiek"), on 9 March 2011 a questionnaire was placed on the website's 'blackboard' for all members to fill out under the heading "Aufruf an ehemalige Grenzer an einer Umfrage teilzunehmen" ("Call for former guards to take part in a survey"), see Figure 18.

**Aufruf an ehemalige Grenzer an einer Umfrage zu Erfahrungen an der Grenze teilzunehmen** in Schwarzes Brett  
von Slam • **Gruppe** | 7 Beiträge • [Nachricht senden](#) | [Profil ansehen](#) | [Slam ist online](#). [Diesen Beitrag melden](#) | 09.03.2011 11:4

Liebe ehemalige Grenzer,



Im Rahmen einer meiner Dissertationsforschung möchte ich ermitteln, wie Grenzsoldaten selber über ihre Arbeit dachten (und heute denken) und welche Erfahrungen Benutzer des Forums der Grenze selber gemacht haben. Dabei geht es mir darum, Tendenzen des Denkens und Verhaltens festzustellen, und somit die Sicht und Erfahrungen der Grenzsoldaten in die wissenschaftliche Diskussion einbringen. Ich werde die Ergebnisse dieser Umfrage natürlich vertraulich behandeln und mit interessierten sehr gerne teilen.

Dies ist der Link zu der Umfrage für ehemalige Grenzsoldaten, die ich (noch) nicht direkt kontaktiert habe:

[http://ww2.unipark.de/uc/Umfrage\\_Grenztruppen/](http://ww2.unipark.de/uc/Umfrage_Grenztruppen/)

Ich freue mich sehr über jeden Teilnehmer und stehe für alle Fragen und Kommentare offen.

Eva

Figure 18 Call for former guards to fill out the questionnaire

In the subsequent days, each individual member was screened and contacted if either self-proclaimed as former guard, or could have been a former guard in cases the profile contained no information. A 'private message' invited the subject to take part in the survey.

As seen in picture in Figure 18, a link led members to the questionnaire, see below. The questionnaire was uploaded via the software provided by unipark and consisted out of a range of closed and open-ended questions, collecting demographic and general information first, before entering the subject of the firing order and possible knowledge of disobedience. In total and over the course of 2 months, 157 former guards completed the questionnaire, taking between 30 minutes and several hours to answer the questions. Respondents were able to choose to skip questions, accordingly, not all questions were answered by all respondents.

## **Questionnaire**

Vielen Dank, dass Sie sich die Zeit nehmen, für unsere interdisziplinäre Studie einige Fragen zu beantworten. Dieser Fragebogen dient dem näheren Verständnisses der Aufgaben und Tätigkeiten von Grenzsoldaten der ehemaligen Deutschen Demokratischen Republik. Ihre Antworten tragen zur wissenschaftlichen Aufarbeitung bei und sollen Meinungen und Erfahrungen von Grenzsoldaten verdeutlichen und in fachliche Diskussionen integrieren.

Das Ausfüllen der Fragen sollte nicht länger als 20 Minuten dauern. Sie können sich selbstverständlich mehr Zeit nehmen. Bitte beantworten Sie die Fragen so ehrlich wie möglich. Falls Sie sich nicht genau erinnern, oder vorziehen, auf eine Frage nicht zu antworten, steht Ihnen das selbstverständlich zu.

Wir möchten Sie darauf aufmerksam machen, dass alle Ihre Daten vertraulich und anonym zu wissenschaftlichen Zwecken verarbeitet werden. Persönliche Erfahrungsberichte werden so verändert, dass diese nicht mehr erkennbar in der Publikation sein werden.

Falls sie zu einem persönlichen Gespräch offen stehen, oder bereit wären, Anschlussfragen zu beantworten, würden wir gerne mit Ihnen Kontakt aufnehmen. In diesem Falle können Sie im letzten Teil Ihre Email oder Kontaktadresse angeben.

Wenn Sie uns Kontaktinformationen hinterlassen, werden wir diese vor dem Zeitpunkt der Publikation löschen.

Bei Rückfragen zu unserer Studie stehen wir Ihnen selbstverständlich gerne zu Verfügung. Auch über unsere Forschungsergebnisse können wir Sie auf Anfrage

selbstverständlich nach Abschluss der Studie gerne informieren.

Herzlichen Dank für Ihre Hilfe!

(end)

## **The questionnaire**

### **TEIL I– Personalia**

Wann wurden Sie geboren?

vor 1940

zwischen 1940 und 1950

zwischen 1950 und 1960

zwischen 1960 und 1970

nach 1970

### **Wo sind Sie aufgewachsen?**

Sie können mehrere Kästchen ankreuzen oder, zum Beispiel die Stadt, in der Sie aufwuchsen , nennen.

auf dem Land

in einer Vorstadt

in einer Kleinstadt (5.000 - 20.000 Einwohner)

in einer Stadt (20.000 - 100.000 Einwohner)

in einer Grossstadt (über 100.000 Einwohner)

in:

Sind Sie religiös?

Nein ja

### **Was ist Ihr höchster Schulabschluss?**

kein Abschluss

Hauptschule, achte Klasse POS

Realschule, zehnte Klasse POS

Gymnasium, EOS

anderer Abschluss, nämlich

### **Was ist Ihr Beschäftigungsverhältnis?**

angestellt

selbstständig

arbeitslos, suchend

arbeitslos, nicht suchend

Rentner  
anderer Arbeitsstand, nämlich

**In welchem Sektor waren Sie vor der Wende tätig (ausser dem Grenzdienst)?**

*Sie können mehrere Felder ankreuzen.*

angestellt in der Landwirtschaft  
angestellt in der Industriewirtschaft angestellt  
im Staatsdienst  
anders, nämlich

**Bitte beschreiben Sie die Arbeit, die Sie im Namen der DDR verrichtet haben:**

Was ist Ihr Familienstand?

*Sie können mehrere Felder ankreuzen.*

Alleinstehend  
in einer Lebensgemeinschaft lebend  
verheiratet  
getrennt  
geschieden  
verwitwet

Wie viele Kinder sind in Ihrem Haushalt aufgewachsen?

*Bitte geben Sie Ihre eigenen wie auch die Kinder Ihrer Partnerin an.*

Keine

1

2

3

mehr als 3

Möchten Sie noch etwas ergänzen?

**TEIL II Fragen zum Schiessbefehl und Erfahrungen mit  
Fluchtversuchen an der Grenze**

Grenzsoldaten der NVA wurden beauftragt, die Grenze mit allen Mitteln zu verteidigen, unter anderem auch mit dem Gebrauch von Schusswaffen, nach dem Warnruf: "Halt, stehen bleiben, oder ich schieße!" sowie dem Abgeben eines Warnschusses.

**Wie dachten Sie über den Befehl als Sie im Grenzgebiet tätig waren?**

Die Grenze betreten oder sich annähern war verboten, deshalb war das Schiessen gerechtfertigt.

Das war mir gleich, es war mein Job.

Ich dachte, es war nicht richtig.

Diese Antworten treffen nicht zu, ich dachte:

**Haben Ihre Kameraden je diesen Befehl diskutiert?**

Nein

Ja

**(falls ,nein‘) Warum hat niemand den Befehl diskutiert, Ihrer Meinung nach?:**

**(falls ,ja‘) Was haben Ihre Kameraden kritisiert?:**

**Haben Sie selbst jemals den Befehl kritisiert?**

Ja

Nein

**(falls ,ja‘) Ich habe den Befehl vor den folgenden Menschen kritisiert:**

*Sie können mehrere Kästchen ankreuzen.*

Freunden

Familienangehörigen

Kameraden

Vorgesetzten

Anderen:

**Bitte beschreiben Sie wann Sie Kritik geäußert haben, was Sie kritisiert haben und ob die Äußerungen Folgen hatten.**

Wann war das (ungefähr)?

Was (in kurz) haben Sie ausgesetzt?

Gab es Folgen?- Wenn ja, welche?

**Hat sich Ihre Haltung zum Befehl während oder nach Ihrem Dienst verändert?**

nein

ja

**(falls ,ja‘) Was hat sich in Ihrer Haltung zu dem Befehl verändert?**

**Bitte beschreiben Sie (kurz) was Sie früher dachten und was Sie heute denken.**

**Was hat, Ihrer Meinung nach, diese Veränderung verursacht?**

**Haben Sie während Ihrer Zeit als Grenzsoldat jemals einen Fluchtversuch beobachtet?**

nein

ja

**(falls ‚ja‘) Wie viele Fluchtversuche haben Sie miterlebt?**

1

2

3 oder mehr

**Wann war das?**

Bitte wählen Sie.

zwischen 1950 und 1960

zwischen 1960 und 1970

zwischen 1970 und 1980

zwischen 1980 und 1990

**Wie viele Flüchtlinge waren an dem Fluchtversuch beteiligt?**

Bitte wählen Sie.

1

2

3

mehr als 3 Person(en)

**Wie viele Grenzsoldaten haben den Fluchtversuch als Augenzeugen miterlebt?**

**Bitte wählen Sie.**

Ich war allein.

Ein anderer Grenzsoldat war anwesend.

Mein Vorgesetzter war anwesend.

Ein Kamerad und unser Vorgesetzter waren anwesend.

Es gab weitere Augenzeugen.

**War der Fluchtversuch erfolgreich?**

nein

ja

Das weiß ich nicht.

**Wurde geschossen um den Fluchtversuch zu verhindern?**

*Falls Sie diese Frage nicht beantworten möchten, gehen Sie bitte zur nächsten Frage.*

Nein. Wir haben nicht geschossen und die Flüchtlinge blieben unverletzt.

Warnschüsse wurden abgegeben.

Nein, aber die Flüchtlinge wurden durch Minen oder anders verletzt.

Ja. Wir haben geschossen, aber die Flüchtlinge blieben unverletzt.

Ja. Wir haben geschossen und die Flüchtlinge wurden verletzt.

Ja. Wir haben geschossen und die Flüchtlinge wurden getötet.

Das weiß ich nicht

**Wann war das?**

Hier können Sie einen Zweiten Fluchtversuch beschreiben. Sollten Sie mehr als zwei Fluchtversuche beobachtet haben und wenn Sie Interesse hätten, weitere Vorfälle zu beschreiben, würden wir uns sehr freuen, von Ihnen zu hören.

*(Die selben Teil- Fragen zum Fluchtversuch folgen)*

**TEIL III Kritik am Schiessbefehl**

**Hat jemals einer Ihrer Kameraden sich ausdrücklich verweigert auf unbewaffnete Zivilisten zu schießen?**

Nein, keiner meiner Kameraden hat das ausdrücklich verweigert.

Ja. Ich habe miterlebt, dass einer (oder mehr) Kamerad(en) sich ausdrücklich geweigert hat (haben), auf unbewaffnete Zivilisten zu schießen.

Ja. Ich habe gehört, dass einer (oder mehr) Kamerad(en) sich ausdrücklich geweigert hat (haben), auf unbewaffnete Zivilisten zu schießen.

**(falls ,nein‘) Was halten Sie für den Grund dafür, dass kein Grenzsoldat den Befehl ausdrücklich verweigert hat?:**

**Falls überhaupt, unter welchen Umständen wäre eine Befehlsverweigerung des Befehls möglich gewesen?**

Können Sie sich irgendeine Situation vorstellen, in der Sie - oder andere Soldaten nicht geschossen hätten (Kinder, Verwandte oder Bekannte et cetera).



Was für eine Person würde den Befehl auf unbewaffnete Zivilisten zu schießen verweigern, Ihrer Meinung nach?

*Bitte beschreiben Sie.*

Was, denken Sie, wären die Folgen der Befehlsverweigerung gewesen? Können Sie das begründen?

**(falls ,ja‘) In welchem Jahr hat sich die Befehlsverweigerung ereignet?**

*Bitte wählen Sie das Jahr.*

**Wie hat der Grenzsoldat den Befehl verweigert?:**

**Zu welchem Kommando gehörte der Verweigerer?**

*Falls Sie diese Frage nicht beantworten möchten, gehen Sie bitte zur nächsten Frage.*

**Wo befand sich der Grenzsoldat zu dem Zeitpunkt als er den Befehl verweigerte?**

in der Kaserne

auf dem Dienstgelände (zum Beispiel auf einem Wachposten)

Er befand sich:

**Haben Andere außer dem Vorgesetzten die Befehlsverweigerung miterlebt?**

nein

ein weiterer Kamerad

weitere Kameraden

Das weiß ich nicht.

**(falls ,ja‘) Was waren die Folgen der Befehlsverweigerung?:**

**Haben Sie mehr als eine Befehlsverweigerung erlebt?**

nein

ja

**(falls ,ja‘) In welchem Jahr war das?**

**Bitte wählen das Jahr.**

**Wie hat der Grenzsoldat den Befehl verweigert?**

**Bitte beschreiben Sie.**

**Zu welchem Kommando gehörte der Verweigerer?**

**Falls Sie diese Frage nicht beantworten möchten, gehen Sie bitte zur nächsten Frage.**

**Wo befand sich der Grenzsoldat zu dem Zeitpunkt als er den Befehl verweigerte?**  
in der Kaserne  
auf dem Dienstgelände (zum Beispiel auf einem Wachposten)  
Er befand sich:

**Haben Andere außer dem Vorgesetzten die Befehlsverweigerung miterlebt?**

nein  
ein weiterer Kamerad  
weitere Kameraden  
Das weiß ich nicht.

**Was waren die Folgen der Befehlsverweigerung?**

**Wann fand die angebliche Befehlsverweigerung, von der Sie gehört haben, statt?**

Falls Sie das Jahr nicht wissen, bitte geben Sie an, wann Sie (ungefähr) von der Befehlsverweigerung gehört haben. Bitte wählen Sie das Jahr.

**Wie haben Sie von der angeblichen Befehlsverweigerung erfahren?**

**Was waren die Folgen der dieser Befehlsverweigerung (soweit Sie wissen)?**

**Haben Sie jemals von einer `Gruppenverweigerung` gehört oder gewußt?**

Darunter fällt zum Beispiel, dass mehrere Grenzsoldaten zusammen ausdrücken, dass sie nicht schießen würden, wenn sie in die Situation kämen.

nein  
ja

**Wann hat sich die Gruppenverweigerung ereignet?**

*Bitte wählen Sie das Jahr.*

**Was haben die Soldaten, die an der Gruppenverweigerung teilgenommen haben, gemacht oder gesagt?**

*Bitte beschreiben Sie was Sie von der Gruppenverweigerung wissen.*

**Was waren die Folgen der Gruppenverweigerung (soweit Sie wissen)?**

**Wie standen Sie zu dem Verhalten der Gruppenverweigerer?**

Ich war damit nicht einverstanden, weil:

Ich konnte es verstehen, weil:

Das war mit egal.

Das weiß ich nicht mehr.

**Haben Sie selbst jemals den Befehl auf unbewaffnete Zivilisten zu schiessen ausdrücklich verweigert?**

ja

nein

**Wenn Sie einen Flüchtling auf frischer Tat erwischt hätten, was wäre eine angemessene Reaktion gewesen?**

Auf den Flüchtling zu schießen, weil:

Das Schießen zu verweigern, weil:

Anders, nämlich:

Das weiß ich nicht.

**In welchem Jahr haben Sie den Schießbefehl ausdrücklich verweigert?**

*Bitte wählen Sie das Jahr.*

**Wie haben Sie den Befehl verweigert?**

**Zu welchem Kommando gehörten Sie damals?**

*Falls Sie diese Frage nicht beantworten möchten, gehen Sie bitte zur nächsten Frage.*

**Wo befanden Sie sich zu dem Zeitpunkt der Befehlsverweigerung?**

in der Kaserne

auf dem Dienstgelände (zum Beispiel auf einem Wachposten)

Ich befand mich:

**Haben Andere außer Ihrem Vorgesetzten Ihre Befehlsverweigerung miterlebt?**

nein

ein weiterer Kamerad

weitere Kameraden

Das weiß ich nicht.

**Was waren die Folgen Ihrer Befehlsverweigerung?**

**Haben Sie jemals miterlebt, dass ein Kamerad den Befehl auf unbewaffnete Zivilisten zu schießen, heimlich nicht ausgeführt hat?**

*Darunter würde zum Beispiel bewusstes Wegschauen oder bewusstes Verfehlen des Zieles fallen.*

ja

nein

Ich habe selbst den Schießbefehl heimlich verweigert.

**(falls ‚nein‘ oben) Warum hat keiner das Ausführen des Befehls heimlich verweigert, Ihrer Meinung nach?**

**Falls überhaupt, unter welchen Umständen wäre eine heimliche Nichtausführung des Befehls möglich?**

*Können Sie sich irgendeine Situation vorstellen, in der Sie - oder andere Soldaten heimlich nicht geschossen hätten (Kinder, Verwandte oder Bekannte et cetera).*

**Was für eine Person würde, Ihrer Meinung nach, den Befehl heimlich verweigern?**

**(falls ‚ja‘ oben) Wie hat der Grenzsoldat den Schießbefehl heimlich verweigert?**

**In welchem Jahr war das?**

*Bitte wählen Sie das Jahr*

**Zu welchem Kommando gehörte der heimliche Verweigerer?**

*Falls Sie uns diese Frage nicht beantworten möchten, verstehen wir das selbstverständlich.*

**Wo befand sich der Grenzsoldat zu dem Zeitpunkt als er den Befehl heimlich verweigerte?**

auf der Kaserne

irgendwo während des Dienstes (zum Beispiel auf einem Wachposten)

Er befand sich:

**Haben andere die Befehlsverweigerung miterlebt?**

nein, nur ich

der Vorgesetzte

ein weiterer Kamerad

weitere Kameraden

Das weiß ich nicht.

**Hatte es Folgen der heimlichen Befehlsverweigerung gegeben?**

**In welchem Jahr haben Sie den Schießbefehl heimlich verweigert?**

*Bitte wählen Sie das Jahr.*

**Wie haben Sie den Befehl heimlich verweigert?**

**Zu welchem Kommando gehörten Sie damals?**

*Falls Sie diese Frage nicht beantworten möchten, gehen Sie bitte zur nächsten Frage.*

**Wo befanden Sie sich zu dem Zeitpunkt der heimlichen Befehlsverweigerung?**

in der Kaserne

auf dem Dienstgelände (zum Beispiel auf einem Wachposten)

Ich befand mich:

**Haben Andere Ihre heimliche Befehlsverweigerung miterlebt?**

nein  
ein weiterer Kamerad  
weitere Kameraden  
Das weiß ich nicht.

**Welche Folgen hatte Ihre heimliche Befehlsverweigerung?**

**Wurden Sie während Ihrer Dienstzeit bei der NVA über Richtlinien für Militärische Gewaltanwendung (Schußwaffengebrauch) unterrichtet?**

nein  
ja

**(falls „ja“) Bitte beschreiben Sie kurz in ein paar Sätzen, was Sie gelernt haben.**

**Glauben oder wissen Sie, ob/dass einige Grenzsoldaten nicht hinter dem Befehl auf unbewaffnete Zivilisten zu schießen standen?**

nein, weil:  
ja, weil:  
Ich bin mir nicht sicher, weil:

#### **TEIL IV -Mauerschützenprozesse**

**In den 90er Jahren wurde der Befehl, als "Schießbefehl" vom Bundesgerichtshof rückwirkend für unrechtmäßig erklärt. Infolgedessen wurden einige Mitglieder des Politbüros und einige Angehörige der Grenztruppen angeklagt und verurteilt. Wie stehen Sie dazu?**

Das war eine Fehlentscheidung, weil:  
Ich halte es für richtig, weil:  
Ich habe keine eindeutige Meinung hierzu, weil“

**Einige Wissenschaftler haben die Auffassung vertreten, dass Grenzsoldaten sich des Risikos, später zur Verantwortung über das Schießen auf Zivilisten gezogen zu werden, hätten bewußt sein müssen, aufgrund der früheren ebenfalls rückwirkenden Verurteilungen von Wehrmachtssoldaten, die ebenfalls unter**

**Befehl standen. Was ist Ihre Meinung zu dieser Auffassung?**

Das halte ich für falsch, weil:

Damit stimme ich überein, weil:

Ich bin mir nicht sicher, weil

**Hatten Sie damals von den Nürnberger Prozessen gegen die Hauptkriegsverbrecher des Zweiten Weltkrieges gehört?**

nein

ja

**Wie haben Sie von den Nürnberger Prozessen erfahren?**

Ich erfuhr davon durch:

Mein Alter war damals (ungefähr)

Ich erfuhr, dass:

**Waren Sie sich jemals des Risikos bewusst, später zur Verantwortung gezogen zu werden im Hinblick auf die Ausführung des Schießen?**

*Bitte erklären Sie, falls Sie möchten.*

Nein, weil

Ja, weil

**Möchten Sie noch etwas zu dem Thema zu ergänzen?**

**TEIL V – Ende**

**In welchem Jahr sind Sie den Grenztruppen beigetreten, bzw. eingezogen worden?**

vor 1961

zwischen 1961 und 1970

zwischen 1970 und 1980

nach 1980

**Aus welchen Gründen sind Sie in die NVA eingetreten?**

um Erfahrungen zu sammeln  
aus Familientradition  
es wurde mir vorgeschlagen  
aus beruflichen Gründen  
anders, nämlich:

**Hatten Sie Arbeitserfahrung bevor sie zum Grenzdienst kamen?**

nein  
ja, nämlich:

**Hat Ihnen die Grenzdienstausbildung gefallen?**

ja, weil:  
nein, weil:

**Wie würden Sie Ihren damaligen direkten Vorgesetzten beschreiben?**

neutral  
streng aber gerecht  
autoritär  
zugänglich/erreichbar  
anders, nämlich:

**Haben Sie während Ihres Dienstes enge Freundschaften zu anderen Kameraden geschlossen, mit denen Sie noch in Kontakt stehen?**

nein  
ja

**Unterschied sich Ihrer Meinung nach die NVA von anderen Armeen?**

ja, weil:  
nein, weil:

**Wann haben Sie die NVA verlassen?**

vor 1961



zwischen 1960 und 1970  
zwischen 1970 und 1980  
nach 1980

**Warum verließen Sie die NVA?:**

**Würden Sie Ihrem Sohn/Neffen/Bruder oder engem Freund empfehlen in die Armee einzutreten?**

nein, weil  
ja, weil

**Wären Sie bereit uns eventuell weitere Fragen zu beantworten?**

nein, weil:  
ja, vielleicht

**(falls ,ja‘) Ich möchte**

anonym bleiben  
nicht unbedingt anonym bleiben

*Bitte geben Sie uns Ihre E-mail-Adresse und oder Ihre Telefonnummer. Falls Sie anonym bleiben möchten, wählen bitte Sie einen Decknamen, unter dem wir Sie kontaktieren dürfen (z.B. Blausoldat).*

*Sollte Ihre E-mail-Adresse Ihren vollen Namen enthalten, werden wir selbstverständlich vertraulich mit Ihren Daten umgehen und diese keinesfalls an Dritte weiterleiten.*

Sie können mich folgendermaßen erreichen:  
Telefonnummer:  
E-mail-Adresse:  
Bitte wiederholen Sie Ihre E-mail-Adresse hier:

**Kennen Sie weitere ehemalige Grenzsoldaten, die eventuell an unserer Studie teilnehmen würden?**

nein

ja:

*Sie können hier Emailadressen und/oder Telefonnummern eintragen.  
Wir freuen uns sehr über jeden weiteren Grenzsoldaten, der an unserer Studie teilnimmt, da unsere Forschungsergebnisse zu den persönlichen Erfahrungen der Grenzsoldaten umso genauer werden je mehr Antworten wir auswerten können. Wir gehen mit allen Ihren Informationen vertraulich um.*

**Wie haben Sie von dieser Umfrage erfahren?**

Ich habe über das Grenzforum den Link erhalten.  
Ich habe den Link von einem ehemaligen Grenzsoldaten erhalten.  
Auf anderem Wege, nämlich:

**Vielen Dank für Ihre Teilnahme an unserer Umfrage.**

Wenn Sie weitere Informationen zu diesem Thema haben, würden wir sehr gerne mehr von Ihnen hören.

Bitte setzen Sie sich bei allen Fragen mit Frau Lingnau in Verbindung:  
e.lingnau@vu.nl oder 0031 2059 88426.

Sollten Sie das Bedürfnis empfinden, über Ihre Gefühle zu sprechen zu wollen, wenden Sie sich bitte an die Deutsche Opferhilfe unter Opferhilfen.de oder rufen Sie kostenlos die deutsche Telefonseelsorge unter 0800/111 0 111 oder 0800/111 0 222 an.

End.

The total number of respondents (n) was adjusted for each question from which a percentage was derived. Respondents could choose to remain anonymous or offer their contact details in case they were interested in follow-up questions



## B. Follow-up Questions

As discussed in chapter 6, follow-up email questions were sent to two individual former guards who had in the questionnaire expressed their general unwillingness to shoot, and added their email addresses, in case of follow-up questions. One respondent preferred to remain anonymous. The third guard concerned former guard Richard Hebstreit, already referred to above. Since Hebstreit gave detailed information about his attitude and experience in his autobiography, there was no need to include him in the follow up question round. Essentially, this means that follow-up questions were asked to two respondents received the following letter upon which they send several pages long detailed answers.

Sehr geehrter XX,  
(... individual text)

Sie haben beschrieben, dass sie kritisch über die Schusswaffengebrauchsbestimmung gedacht haben, und nicht auf andere Menschen schießen wollten. Zu DDR Zeiten wurde ein Haß-bild propagiert und zu dem wird in vielen militärischen Institutionen wird eine blinde Gehorsamkeit angestrebt. (In der BRD ist das heute allerdings gar nicht mehr der Fall, ganz im Gegenteil.) Ich suche nun nach möglichen persönlichen Erklärungen, warum einige junge Männer (unter anderen: Sie) weniger oder gar nicht von der Indoktrination und dem Umfeld beeinflusst wurden. Neben allgemein bekannten Theorien zur Moralischen Entwicklung in der Sozialpsychologie, finde ich es auch wichtig, bei jeden einzelnen hinzuschauen, wie er selber seine damalige Haltung erklären würde.

Ich würde Sie gerne dazu einladen, nochmal einmal zurückblickend in sich zu gehen. Könnten Sie selber in Ihren Worten versuchen zu erklären, was ihr Gewissen als junger Mann beeinflusst haben könnte?

1.1. Denken Sie dabei vielleicht an Ihr Elternhaus und Familie und deren politische Haltung. Wurde in Ihrem Elternhaus über die Grenze gesprochen, wurden zum Beispiel Parteikritische Äußerungen gemacht?

1.2. Hat die Erziehung bei Ihrer moralischen Entwicklung eventuell eine Rolle, war es Ihren Eltern vielleicht sehr wichtig, Sie zum Selber-Denken zu erziehen?

1.3. Hatten Sie Freunde oder Bekannte, oder andere Menschen, die Ihre eigenständige Denkweise mitbeeinflusst haben könnten?

1.4. Hatten Sie ein Vorbild?

1.5. Haben Sie eventuell Erfahrungen gemacht, die Ihre moralische Entwicklung beeinflusst haben könnten? (Zum Beispiel hat ein Grenzer beschrieben, wie er anfangs noch dachte das Schießen auf Menschen in der Sperrzone sei gerechtfertigt, aber nachdem er selber Menschen kennenlernte, die ein legale Ausreise beantragten, und von den tatsächlichen

Konsequenzen solcher Versuche erfahren hatte, war ihm klar, dass viele Menschen, die die DDR verlassen wollten, nicht Verbrecher waren und dementsprechend schießen in den meisten Fällen ungerechtfertigt war.)

1.6. Waren Sie gläubig?

2. Während der Musterung wurde vielen (wenn nicht allen) die Frage gestellt, ob sie bereit wären, gegebenen Falls Gebrauch von der Schusswaffe zu machen. Wie haben damals Sie auf diese Frage geantwortet?

3. Während Ihrer Zeit als Grenzer, wie standen Sie zu Ihren Kammeraden?

3.1. Waren Sie eng befreundet?

3.2. Konnten sich offen austauschen, oder hatten Sie Angst, dass ‚man an die ‚falsche Person‘ geraten könnte?

4. Können Sie Ihre(n) Vorgesetzten etwas beschreiben?

4.1. War(en) Ihr(e) Vorgesetzte(r) sehr streng oder eher liberal?

4.2. Wissen Sie, wie Ihr(e) Vorgesetzte(r) zu der Schusswaffengebrauchsbestimmung stand(en)?

Wenn Sie selber noch etwas zu dem Thema schreiben können oder möchten was Sie selber für sehr wichtig halten, bitte Schreiben Sie. Ihre persönliche Meinung trägt zum besseren Verständnis und der wissenschaftlichen Aufarbeitung der damaligen Situation von Grenzern bei.

Mit Ihren Antworten und Reflektionen werde ich selbstverständlich vertraulich umgehen. So werden Sie gegeben Falls als „Vorname G.“ oder als „R167“ (anonym, R steht dabei für „Respondent“ damit mit man die Aussagen einzelner unterscheiden kann).

Ich freue mich sehr, wieder von Ihnen zu hören und stehe Ihnen selbstverständlich auch für Rückfragen bereit.

Vielen Dank im Voraus!

Mit freundlichen Grüßen,

Ihre Eva

# Appendix 2: FRG Law regarding the use of firearms

1961 “Gesetz über den unmittelbaren Zwang bei Ausübung öffentlicher Gewalt durch Vollzugsbeamte des Bundes (UZwG) (last modification 24.5.2016)

- Article 3: limitation of basic rights: (life, physical integrity, personal freedom and inviolability of home)
- Article 4: principle of proportionality:

(1) Die Vollzugsbeamten haben bei der Anwendung unmittelbaren Zwanges unter mehreren möglichen und geeigneten Maßnahmen diejenigen zu treffen, die den einzelnen und die Allgemeinheit am wenigsten beeinträchtigen.

(2) Ein durch eine Maßnahme des unmittelbaren Zwanges zu erwartender Schaden darf nicht erkennbar außer Verhältnis zu dem beabsichtigten Erfolg stehen.

- Article 7: Obedience to Orders

(1) Vollzugsbeamte sind verpflichtet, unmittelbaren Zwang anzuwenden, der im Vollzugsdienst von ihrem Vorgesetzten oder einer sonst dazu befugten Person angeordnet wird. Dies gilt nicht, wenn die Anordnung die Menschenwürde verletzt oder nicht zu dienstlichen Zwecken erteilt worden ist.

(2) Eine Anordnung darf nicht befolgt werden, wenn dadurch eine Straftat begangen werden würde. Befolgt der Vollzugsbeamte die Anordnung trotzdem, so trifft ihn eine Schuld nur, wenn er erkennt oder wenn es nach dem ihm bekannten Umständen offensichtlich ist, dass dadurch eine Straftat begangen wird.

(3) Bedenken gegen die Rechtmäßigkeit der Anordnung hat der Vollzugsbeamte dem Anordnenden gegenüber vorzubringen, soweit das nach den Umständen möglich ist.

(4) § 56 Abs. 2 und 3 des Bundesbeamtengesetzes in der Fassung der Bekanntmachung vom 17. Juli 1971 (Bundesgesetzbl. I S. 1181) (Nr.75) ist nicht anzuwenden. (§56 (1) refers to the personal responsibility/liability officers carry for actions under their official work. Section (2) and (3) which are not applicable for the use of force describe the procedures an officer has to follow when he is doubtful regarding the lawfulness or legitimacy of his orders: in the first step of other cases (thus, in cases where it is not ordered to use firearms or physical force, then the officer has to not only express their doubts to the superior, but if the superior insists on the rightfulness of the orders, then the officer has to carry out the order, except if it seems obviously illegal or if carrying out the order would violate the human dignity of another person, then the officer is exempt from personal liability. (3) repeats the instruction, also if the superior demands immediate obedience to his orders.

- Article 10 Use of Firearms against persons

Schusswaffen dürfen gegen einzelne Personen nur gebraucht werden, um die unmittelbar bevorstehende Ausführung oder die Fortsetzung einer rechtswidrigen Tat zu verhindern, die sich den Umständen nach als ein Verbrechen oder als ein Vergehen, das unter Anwendung oder Mitführung von Schusswaffen begangen werden soll oder ausgeführt wird, darstellt; um eine Person, die sich der Festnahme oder der Feststellung ihrer Person durch die Flucht zu entziehen versucht, anzuhalten, wenn sie bei einer rechtswidrigen Tat auf frischer Tat betroffen wird, die sich den Umständen nach als ein Verbrechen darstellt oder als ein Vergehen, das unter Anwendung oder Mitführung von Schusswaffen oder Sprengstoffen begangen wird, eines Verbrechens dringend verdächtig ist oder eines Vergehens dringend verdächtig ist und Anhaltspunkte befürchten lassen, dass sie von einer Schusswaffe oder einem Sprengstoff Gebrauch machen werde; zur Vereitelung der Flucht oder zur Wiederergreifung einer Person, die sich in amtlichen Gewahrsam befindet oder befand zur Verbüßung einer Freiheitsstrafe wegen einer Straftat mit Ausnahme des Strafarrestes, zum Vollzug der Unterbringung in der Sicherungsverwahrung, wegen des dringenden Verdachts eines Vergehens, wenn zu befürchten ist, dass sie von einer Schusswaffe oder einem Sprengstoff Gebrauch machen werde; gegen eine Person, die mit Gewalt einen Gefangen oder jemanden, dessen Unterbringung in der Sicherungsverwahrung (§ 66 des Strafgesetzbuches), einem psychiatrischen Krankenhaus (§ 63 des Strafgesetzbuches, § 126 a der Strafprozessordnung) oder einer Entziehungsanstalt (§ 64 des Strafgesetzbuches), § 126 a der Strafprozessordnung) angeordnet ist, aus dem amtlichen Gewahrsam zu befreien versuch. Schusswaffen dürfen gegen eine Menschenmenge nur dann gebraucht werden, wenn von ihr oder aus ihr heraus Gewalttaten begangen werden oder unmittelbar bevorstehen und Zwangsmaßnahmen gegen einzelnen nicht zum Ziele führen oder offensichtlich keinen Erfolg versprechen. Das Recht zum Gebrauch von Schusswaffen auf Grund anderer gesetzlicher Vorschriften bleibt unberührt.

- Article 11 – Use of Firearms in the border regime

Die in § 9 Nr. 1, 2 7 und 8 genannten Vollzugsbeamten können im Grenzdienst Schusswaffen auch gegen Personen gebrauchen, die sich der wiederholten Weisung zu halten oder die Überprüfung ihrer Person der etwa mitgeführten Beförderungsmittel und Gegenstände zu dulden, durch die Flucht zu entziehen versuchen. Ist anzunehmen, dass die mündliche Weisung nicht verstanden wird, so kann sie durch einen Warnschuss ersetzt werden.

Als Grenzdienst gilt auch die Durchführung von Bundes- und Landesaufgaben, die den in Absatz 12 bezeichneten Personen im Zusammenhang mit dem Grenzdienst übertragen sind.

- Article 12 Besondere Vorschriften für den Schusswaffengebrauch

Schusswaffen dürfen nur gebraucht werden, wenn andere Maßnahmen des unmittelbaren Zwanges erfolglos angewendet sind oder offensichtlich keinen Erfolg versprechen. Gegen Personen ist ihr Gebrauch nur zulässig, wenn der Zweck nicht durch Waffenwirkung gegen Sachen erreicht werden wird.

Der Zweck des Schusswaffengebrauchs darf nur sein, angriffs- oder fluchtunfähig zu machen. Es ist verboten zu schießen, wenn durch den Schusswaffengebrauch für die Vollzugsbeamten erkennbar unbeteiligte mit hoher Wahrscheinlichkeit gefährdet werden, außer wenn es sich beim Eingreifen gegen die Menschenmenge (§ 10, Abs 2) nicht vermeiden lässt.

Gegen Personen, die sich mit dem äußeren Eindruck nach im Kindesalter befinden, dürfen Schusswaffen nicht gebraucht werden.

- Article 13 Androhung

Die Anwendung von Schusswaffen ist anzudrohen. Als Androhung gilt auch die Abgabe eines Warnschusses. Einer Menschenmenge gegenüber ist die Androhung zu wiederholen.

Der Einsatz von Wasserwerfern und Dienstfahrzeugen gegen eine Menschenmenge ist anzudrohen.

- Article 56

(1) Der Beamte trägt für die Rechtmäßigkeit seiner dienstlichen Handlungen die volle persönlich Verantwortung.

(2) Bedenken gegen die Rechtmäßigkeit dienstlicher Anordnungen hat der Beamte unverzüglich bei seinem unmittelbaren Vorgesetzten geltend zu machen. Wird die Anordnung aufrechterhalten, so hat sich der Beamte, wenn seine Bedenken gegen ihre Rechtmäßigkeit fortbestehen, an den nächsthöheren Vorgesetzten zu wenden. Bestätigt dieser die Anordnung, so muss der Beamte sie ausführen, sofern nicht das ihm aufgetragene Verhalten strafbar und die Strafbarkeit für ihn erkennbar ist, oder das ihm aufgetragene Verhalten die Würde des Menschen verletzt; von der eigenen Verantwortung ist er befreit. Die Bestätigung hat auf Verlangen Schriftlich zu erfolgen.

(3) Verlangt der unmittelbare Vorgesetzte die sofortige Ausführung der Anordnung, weil Gefahr im Verzuge besteht und die Entscheidung des nächsthöheren Vorgesetzten nicht rechtzeitig herbeigeführt werden kann, so gilt Absatz (2) Satz 3 und 4.





# Appendix 3: Trial of Karl Heinz W. (Mauerschützenprozess)

The subsequent section illustrates the case of former guard Karl Heinz W. who was convicted by the Regional or District Court (Landgericht Berlin), sought revision at the Federal Court of Justice (Bundesgerichtshof), the Federal Constitutional Court (Bundesverfassungsgericht) and finally the European Court of Human Rights, all of which upheld the judgment of the District Court. In 1972, former guard Karl Heinz W., who along with other guards used his firearm to prevent the border crossing of Manfred Weylandt, shooting numerous rounds at the 29-year-old escapee halfway through his swim through the river Spree from East to West Berlin (Hertle & Nooke, 2009, p. 327). While his actions were praised in the GDR, where he received the Order of the Merit and 150 DDR Marks, he had to defend himself for causing the death of Weylandt at the Berlin Regional Court (Case of K-H. W. v. Germany, ECHR, Judgment, application number 37201/97).

At the Berlin Regional Court (Landgericht), the shooter was charged with intentional homicide (Totschlag, Article 113 of the GDR's Criminal Court). The court held that the applicant could not rely on the GDR's People's Police Act (Schußwaffengebrauchsbestimmung), as because the border crosser (fugitive) was swimming, he could not be classified as committing a serious crime within the meaning of Article 213 section 3 the Criminal Code (ECHR, judgment, *ibid.*)

Most importantly, the court held that despite referring to daily instructions, military indoctrination as well as the military context (the fact that the guard would be investigated if a border crossing took place during his duty) that “even for a private soldier, it should have been obvious that firing at an unarmed person infringed (upon) the duty of humanity (“Gebot der Menschlichkeit”) and that the applicant could have fired into the water without having to fear the consequences of disobeying orders, since it would have been impossible to observe the exact trajectory of the bullets under water” (ECHR judgment, *ibid.* p. 6).

The case went before the Federal Court of Justice (Bundesgerichtshof), where judges referred to the formula of Radbruch and supplemented it with international human rights covenants (*ibid.*, p. 11).<sup>352</sup> In the subsequent instance, the Federal Constitutional Court

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<sup>352</sup> “The Federal Court of Justice developed its case law ... It states that a court must disregard a justification if it purports to exonerate the intentional killing of persons who sought nothing more than to cross the intra-German border unarmed and without endangering interests generally recognised as enjoying legal protection, because such a justification, which puts the prohibition on crossing the border above the right to life, must remain ineffective on account of a manifest and intolerable infringement of elementary precepts of justice and of human rights protected under international law. The infringement in question is so serious as to offend against the legal beliefs concerning the worth and dignity of human beings that are common to all peoples. In such a case positive law has to give way to justice.” (Judgment Application No. 37201/97, ECHR p.10.). Furthermore, the court held that State practice did

(Bundesverfassungsgericht) decided that “Criminal responsibility was thus established in a constitutionally unobjectionable manner. That applies also inasmuch as the requirements for acting in obedience to orders (*Handeln auf Befehl*) were held not to have been satisfied” (ibid. p. 12). The judges decided that “the killing of an unarmed fugitive by sustained fire (*Dauerfeuer*) was, in the circumstances they had found, such a dreadful and wholly unjustifiable act that it must have been immediately apparent and obvious even to an indoctrinated person that it breached the principle of proportionality and the elementary prohibition on the taking of human life” (ibid., p.13) .

The case of applicant K-H. W. was finally (in 2001) reviewed by the European Court of Human Rights, whereby the judges rejected the applicant’s claim that the act on account of which he had been prosecuted did not constitute an offence under national or international law at the time when it was committed (Albrecht, 2001).

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not derive a ground for justification, “purporting to allow ‘border violators’ to be killed must be disregarded as an instance of extreme State injustice” (ibid. p. 11). It thereby superimposed on to the legal provisions (as discussed above, they were not necessarily manifestly illegal) and saw them as orders which left no room for limitation of the use of firearms according to the principle of proportionality, and which imposed an on the spot the view ... that the border violators had to be “annihilated” if they could not be prevented from crossing the border by other means. Through that subordination of the individual’s right to life to the State’s interest in preventing border crossings, the written law was eclipsed by the requirements of political expediency. Objectively speaking, this constituted an extreme injustice.” (ibid. p.11).

# Appendix 4: Respondents' evasive behaviour responses

The following 32 respondents all answered at different points in the questionnaire that they would evade having to shoot:

	Respondent	Answer	Page number
1	R 90	stated he would have shot into the air	(p.47)
2	R 165	shoot without scoring	(p.47)
3	R 175	amongst his comrades, almost all of us thought that we would have missed had it gotten to that situation.	(p.6, p.34)
4	R 219	would have missed	(p.48)
5	R 237	stated he would have never shot a person, but that was something that would not be talked about	(p.18, p.30)
6	R 241	stated: if at all, shoot in the air and then run	(p.48)
7	R 271	stated he would have never shot anyone, preferred to go to prison	(p.4)
8	R 272	miss	(p.48)
9	R 286	I would have not shot at people, and would not have shot at children	(p.30)

10	R 297	warning shot, then miss	(p. 30, p.48)
11	R 315	make oneself rare (disappear)	(p.48)
12	R 322	stated that he would have looked the other way if he saw escapees	(p.50)
13	R 351	warning shot into the air - if no reaction – missing the target	(p.31, p.48)
14	R 354	if I would have been directly ordered, I would have tried to miss the target  r 356 not shooting the escapee but missing	(p.48)
15	R 382	I could only imagine shooting an officer or murderer	(p.31)
16	R 394	we did discuss the order and agreed among us that we would never shoot people	(p.11)
17	R 405	I would shoot, but miss the target	(p.49,p. 109)
18	R 418	arrest without violence, otherwise pretend one did not realise what was going on	(p. 49, p.109)
19	R 436	if shooting, then missing	(p.49)
20	R 442	you do not have to shoot the person (miss)	(p.5)

21	R 460	secretly considered arguments against using the weapon, and not wanting to shoot a target (missing) was thought about	(p.12)
22	R 461	if shoot, directly next to the person	(p.49)
23	R 469	warning shots were ok, but “scoring has never been my strong point”	(p.5)
24	R 495	shooting, but not to target the person	(p.49)
25	R 496	“sometimes you do not see everything”	(p.49)
26	R 503	shooting and missing	(p.49)
27	R 504	they can give me many orders, whether I ‘score’ is a different question. Stated that if he was in the situation, he would have missed	(p.5, p.47)
28	R 514	Shooting only as self-defense – otherwise, I would have let the person escape	(p. 32, p.109)
29	R 599	warning shot – but not to target the person	(p.49)
30	R 624	not target shooting	(p.49, p. 109)
31	R 394	direct contact arrest ... depending on the situation, but I would have never targeted the person	(p.11, pp. 48-49, p. 87, p. 109)

This study takes a multidisciplinary approach to better understand and explain how and why soldiers refuse to obey illegal orders for conscientious reasons. The study aims at contributing to the academic community by proposing a novel theoretical framework that includes examining factors in three interactive dimensions.

The macro, meso, and micro dimensions of the theoretical framework bring together the conflict, the military, and environmental factors with the context of the illegal order, the role of the superior and comrades, and how the soldier's own cognitions, self-image, and experience influence to what extent the soldier activates moral disengagement mechanisms, summarised as authorisation (of violence), routinisation (of violence) and de-humanisation (of victims) that are commonly reinforced in the macro dimension and perpetuated by surrounding individuals in the meso dimension.

The study applies the theoretical framework to two cases, the 1968 massacre perpetrated by U.S. soldiers in My Lai, and the controversial East German regulations (firing order) aimed at halting citizens fleeing to the West during the Cold War. The study distinguishes between direct and indirect disobedience. The conclusion places emphasis on the willingness of military institutions to enable soldiers to disobey illegal orders.